Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

THE CROW TRIBE OF INDIANS,

Cross-Petitioner,

v.

STATE OF MONTANA; MARY BRYSON; BIG HORN COUNTY; MARTHA FLETCHER; and UNITED STATES OF AMERICA,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether doubts should be resolved against the wrongdoer and appropriate equitable relief should be fashioned to remedy the violation of the statutory and sovereign rights of the Crow Tribe by the imposition of Montana's invalid 30% taxes on the Tribe's coal resources based on the courts' finding that the illegal taxes "impair[ed] the tribe's ability to negotiate leases with Shell Oil and other coal companies."

PARTIES

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Petitioner Crow Tribe of Indians (Tribe) hereby conditionally cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals that is the subject of this appeal is reported at 92 F.3d 826 and 98 F.3d 1194 (1996) (*"Crow IV"*) and is reproduced in the Appendix to the Petition (Pet. App.) commencing at 1. Prior decisions in this matter by the Ninth Circuit are reported at 650 F.2d 1104 (1981), *amended*, 665 F.2d 1390 (1982) (*"Crow I"*), *cert denied*, 459 U.S. 916 (1982), reproduced in the Pet. App. commencing at 167 and 169; at 819 F.2d 895 (1987) (*"Crow II"*), reproduced in the Pet. App. commencing at 88; and at 969 F.2d 848 (1992) (*"Crow III"*), reproduced in the Pet. App. commencing at 58. A prior summary affirmance of the Court of Appeals' 1987 decision in *Crow II* is reported at 484 U.S. 997 (1988), reproduced in the Pet. App. at 87.

The opinion of the District Court in *Crow IV* is unreported and is reproduced in the Pet. App. commencing at 17. The prior reported opinion of the District Court, which was the subject of review by the Court of Appeals in *Crow I*, appears at 469 F.Supp. 154 (D. Mont. 1979), reproduced in the Pet. App. commencing at 197. The District Court's reported opinion reviewed in *Crow II* appears at 657 F.Supp. 573 (D. Mont. 1985), reproduced in

the Pet. App. commencing at 110. An unreported opinion of the District Court reviewed by the Court of Appeals in *Crow III* is reproduced in the Pet. App. commencing at 67.

JURISDICTION

The judgment of the Court of Appeals was entered on August 6, 1996. The Tribe's petition for rehearing was denied on November 21, 1996. Appendix to Cross-Petition at 1. The petition for rehearing of the State of Montana and the other petitioners was denied on February 21, 1997. Pet. App. at 228. The Tribe's conditional cross-petition is filed pursuant to Supreme Court Rule 12.5. The petition for a writ of certiorari (No. 96-1829) was docketed on May 16, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

In *Crow II*, the Court of Appeals for the Ninth Circuit held that Montana's severance and gross proceeds taxes on coal produced from the Tribe's coal deposits impermissibly infringed on the Crow Tribe's sovereignty and interfered with the policy of promoting tribal self-government and economic development underlying the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, were not narrowly tailored to achieve Montana's legitimate interest, and therefore were preempted by federal law. 819 F.2d 895, Pet. App. 88. *See Crow IV*, 92 F.3d at 828, Pet. App. 6 (summarizing the holding of *Crow II*). This Court summarily affirmed without opinion. 484 U.S. 997 (1988),

Pet. App. 87.[1] The issue presented in this conditional cross-petition arises from that holding and is based on one of its findings, that Montana's illegal coal taxes "impair the tribe's ability to negotiate leases with Shell Oil and other coal companies."

The provisions of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, are reproduced in the Appendix to this conditional cross-petition.

STATEMENT OF THE CASE

A. DISTRICT COURT JURISDICTION

The District Court has had jurisdiction over this action since it was brought by the Tribe in 1978 pursuant to 28 U.S.C. §§ 1331 (federal question), 1362 (Indian tribe as plaintiff and federal question) and 1343(a)(3) (action to redress deprivations under color of state law of rights secured by federal law). Since 1983 when the United States intervened as a plaintiff, the District Court also has had jurisdiction under 28 U.S.C. § 1345 (United States as plaintiff).

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[1] In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186 & n.17 (1989), this Court distinguished Montana's "unique" and "extraordinarily high" coal taxes which imposed a "substantial burden" on the Crow Tribe from the state oil and gas taxes there at issue, upheld the validity of those state oil and gas taxes as applied to tribal minerals, and declined to reexamine its summary affirmance in *Crow II*.

B. FACTUAL BACKGROUND

In 1972, the Tribe and Shell Oil Company (Shell) entered into a coal lease pursuant to the Indian Mineral Leasing Act, 25 U.S.C. §§ 396a *et seq*. Following the Arab oil embargo in 1973 and the subsequent vast changes in the energy market, the Tribe began renegotiating the terms of its coal leases with Shell, Westmoreland and other coal companies. In November 1974, the Tribe and Westmoreland successfully renegotiated their 1972 lease. Pet. App. 30.

The Tribe then turned its attention to renegotiating the Shell lease. In late 1974 and early 1975, Shell entered into contracts with two utilities to sell them approximately 8 million tons of coal annually from its projected Crow mine. *Crow IV*, 92 F.3d at 830, Pet. App. 12-13; Pet. App. 38-89.

In April 1975, Montana enacted statutes imposing severance and gross proceeds taxes on coal produced within the State with no exception for coal owned by Indian tribes. Mont. Code Ann. § 15-35-101 to 111, 15-23-701 to 704. The severance tax rate charged on Crow coal produced during the 1975-1982 period was 30 percent of the value of the contract sales price of the coal. Pet. App. 25. The rate of the gross proceeds tax is equivalent to the number of mills levied for general property tax by the county in which the production occurred. Pet. App. 25-26. The amount of the gross proceeds tax on Crow coal varied somewhat from year to year but was generally in the range of approximately 5% of the contract sales price. Pet. App. 26. The effective rate of the

combined severance and gross proceeds tax exceeded 30%. *Crow II*, 819 F.2d at 899 n.2, Pet. App. 98.

Tribal representatives appeared before the Montana legislature and strongly opposed the imposition of the proposed severance and gross proceeds taxes on Crow coal on the grounds that:

> (1) they are so out of line with taxes imposed by other neighboring states that Crow coal will no longer be competitive and therefore our coal development program will suffer, and (2) . . . the taxes bear no relation to the responsibilities and burdens which coal development has imposed on the State of Montana . . . [and 3] . . . this level of taxation is so high that [it] becomes an unauthorized state interference with federally secured Indian property.

ER 1.[2] The Tribe proposed a compromise under which coal producers would receive a credit against state taxes for coal taxes paid to Indian tribes. The Senate Taxation Committee rejected the Tribe's proposal, commenting that "there would have to be court decreed settlements regarding Indian coal revenues." ER 5. *See Crow IV*, 92 F.3d at 829, Pet. App. 9. *See also*, Pet. App. 23.

In enacting the coal taxes, the Montana legislature found that strip-mined coal is in sufficient demand that:

> [A]t least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes. . . .

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[2] "ER" refers to the Tribe's excerpts of record filed with the Court of Appeals for the Ninth Circuit in *Crow IV*.

Mont. Code Ann. § 15-35-101(1)(e). In *Crow I*, 650 F.2d at 1113, Pet. App. 185, the Court of Appeals quoted this legislative finding and stated: "[b]y setting the severance tax rate at 30 percent of value, Montana made plain its intention to appropriate most of the economic rent."[3] *See also, Crow II*, 819 F.2d at 902, Pet. App. 104-05; *Crow IV*, 92 F.3d at 829, Pet. App. 10 ("we had . . . found [in *Crow I*] the coal taxes were intentionally and illegitimately levied to appropriate most of the economic rent from Tribal coal . . . ").

The Tribe enacted its own 25% severance tax in early 1976. The tribal tax was approved by the Bureau of Indian Affairs as applied to the coal within the exterior surface boundaries of the Reservation (which included the coal leased to Shell). Pet. App. 19, 31.

The existence of dual tribal and state taxes created obvious and severe problems for the Tribe and Shell in renegotiating the terms of the Shell lease. Montana's taxes significantly reduced the compensation Shell could offer the Tribe. *See Crow I*, 650 F.2d at 1113 n.13, Pet. App. 186. Shell's chief negotiator testified in the 1984 *Crow II* trial that Shell would have paid coal taxes either to the Tribe or to the State and would have offered the Tribe an additional $480 million over a 20 year period if Montana had not sought to apply its taxes to the coal Shell had leased from the Tribe. He stated that he thought that would have made a difference in the negotiations. ER

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[3] " 'Economic rent' is the amount of revenue that can be extracted from an activity, here in the form of royalties and taxes, without significantly discouraging production." *Crow I*, 650 F.2d at 1113 n.12, Pet. App. 185.

37-38. The Tribal Chairman testified that Montana's taxes left no room for the Tribe and Shell to come up with a deal, ER at 48, and the Tribe's main negotiator stated that the Shell proposal would have been accepted in 1976 had it not been for Montana's severance tax. ER 54-55. There was no testimony linking the failure of the Tribe and Shell to reach agreement in the mid-1970s to any factor other than Montana's illegal taxes. Nor was there evidence presented by any witness that the Tribe and Shell would not have been able to agree on an amended lease if Montana had not sought to apply its taxes to the Tribe's coal. All of the other issues involved in the Tribe/Shell negotiations had been resolved in the November 1974 amended lease with Westmoreland which was concluded a few months before enactment of Montana's taxes.

The Court of Appeals found in *Crow II* that Montana's illegal taxes "impair the tribe's ability to negotiate leases with Shell Oil and other coal companies." 819 F.2d at 903, Pet. App. 109. That finding was not challenged at the 1994 trial and was restated in the District Court's 1994 decision. Pet. App. 38. *See also*, Pet. App. 41 ("[t]he existence of the Montana taxes left less room for the Tribe and Shell to negotiate more favorable financial terms to the Tribe").

Shell's would-be utility customers made other arrangements to purchase coal due to the inability of the Tribe and Shell to reach agreement on an amended lease in time to meet the utilities' needs. One of the utilities acquired its coal from a nearby mine in Montana. *See, Crow IV*, 92 F.3d at 830, Pet. App. 13; Pet. App. 40-41. The expert economist for the Tribe and the United States testified at the 1994 trial that the Tribe suffered damages

of more than $300 million because Shell was not able to fulfill its coal supply contracts with the utilities. He also testified that Montana and Big Horn County realized approximately $250 million in taxes and other revenues as a result of the coal purchased by Shell's would-be customer from the nearby, off-reservation mine. ER 121-22.

By the time Montana's coal taxes were held invalid in *Crow II* in 1987, the demand for coal from the Powder River Basin in Wyoming and Montana had significantly declined. The window of opportunity for marketing the Tribe's coal had closed. ER 228s-228u.

C. *CROW II.*

The holding of the Court of Appeals in *Crow II* that Montana's coal taxes interfered with the purposes underlying the Indian Mineral Leasing Act and infringed on the Crow Tribe's sovereignty was based on the following findings, among others: (i) Montana's "taxes increase the costs of production by the coal producers, reducing in turn the royalty that can be paid to the Tribe," 819 F.2d at 899, Pet. App. 97; (ii) Montana's taxes "forced the coal producers to charge higher prices, reducing the demand for their Montana coal and resulting in fewer sales for the producers and fewer royalties to the Tribe," *ibid*; (iii) "[b]y taking revenue that would otherwise go towards supporting the Tribe and its programs, and by limiting the Tribe's ability to regulate the development of its coal resources, the state tax threatens Congress' overriding objective of encouraging tribal self-government and economic development," 819 F.2d at 902-03, Pet. App. 107;

(iv) Montana's "high taxes affect tribal revenues by interfering with the Tribe's coal leasing efforts. Because of the taxes the lessee cannot find a buyer, making it difficult for Crow to find a lessee," 819 F.2d at 903, Pet. App. 108; and (v) Montana's taxes "interfere with tribal economic development and autonomy," *ibid.* *See, Crow III*, 969 F.2d at 848-49, Pet. App. 59-60 (reiterating several of the *Crow II* findings); and *Cotton Petroleum*, 490 U.S. at 186 & n.17 (distinguishing Montana's "unique," "unusually large" and "extraordinarily high" coal taxes which "imposed a substantial burden on the Tribe" and "had a negative effect on the marketability of coal produced in Montana" from New Mexico's oil and gas taxes there at issue).

D. PROCEEDINGS BELOW (IN *CROW IV*)

The District Court denied the claims of the Tribe and the United States for compensation based on the impairment of the Tribe's ability to negotiate with Shell. It acknowledged that the State's taxes left less room for the Tribe and Shell to reach agreement on financial terms and impaired the Tribe's ability to negotiate leases with Shell and others. It found, however, that there were "other sharp points of disagreement which clearly delayed successful negotiations," and "do not support a cause and effect relationship between Montana's coal taxes and the Tribe's alleged damages." Pet. App. 38, 41, 56. The District Court also found that the State's illegal taxes did not have as their "conscious objective" interference with the Tribe's lease with Shell and that "the record is devoid of evidence that defendants' coal taxes were calculated to cause damage to the Tribe." Pet. App. 41-42, 56.

In its legal conclusions, the District Court stated that "[t]he substantive elements of [the Tribe's contractual impairment] claim are drawn from the intentional tort of interference with contractual and business relations." It proceeded to apply Montana law which requires, *inter alia*, that the act be "willful," "calculated to cause damage" and "done with an unlawful purpose of causing damage or loss." Pet. App. 54-55. The District Court did not address the Tribe's arguments that a uniform federal rule should be applied to redress the violation of federal law or that the Tribe's claim should be treated as a request for equitable relief predicated on the violation of the Tribe's federally secured rights. Nor did the District Court consider the Tribe's contentions (predicated on *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 380-85 (1970); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1946); and *R.H. Stearns Co. v. United States*, 291 U.S. 54, 61-62 (1934)) that Montana should bear the risk of any uncertainties created by its violation of federal law.

The Court of Appeals affirmed the denial of the contractual impairment claim on the basis of the District Court's finding that Montana's illegal taxes had not caused the impasse between the Tribe and Shell. It did not address the substantive elements of the claim or determine whether it should be viewed as a state law tort or a request for equitable relief predicated on the violation of federal law. *Crow IV*, 92 F.3d at 830-31, Pet. App. 12-14.

In the context of reversing the District Court's denial of the claim for recovery of the taxes illegally collected from Westmoreland, the Court of Appeals determined that the District Court had erred in finding that Montana

did not act with wrongful intent or an unlawful purpose. The Court of Appeals stated: "we had already found the coal taxes were intentionally and illegitimately levied to appropriate most of the economic rent from Tribal coal." *Crow IV*, 92 F.3d at 829, Pet. App. 9-10. Montana's wrongful intent and unlawful purpose were not considered in the portion of the Court of Appeals' opinion affirming the denial of the Shell contractual impairment claim.

With regard to the legal standards, burdens and presumptions governing the causation issue, the Court of Appeals concluded that the *Bigelow* rule, that "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," applied only to proof of the amount of damages, not to causation. *Mills* was distinguished on the ground that it was a securities case. The Court of Appeals stated: "the Tribe has offered no reason to extend to this area the Supreme Court's analysis of proof of causation in securities cases set out in" *Mills*. 92 F.3d at 830 n.4, Pet. App. 13. The Tribe's petition for rehearing was denied. Cross-Pet. App. at 1.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The Tribe's conditional cross-petition should be granted if the petition filed by Montana and its co-petitioners is granted. The questions presented in the petition and in the conditional cross-petition arise out of the same wrong, Montana's illegal application of its taxes to the Tribe's coal. The general issue raised in this conditional

cross-petition – the legal standards, burdens and presumptions applicable to determining causation in fashioning appropriate equitable relief to remedy violations of federal law – is an important matter that occurs in various contexts including civil rights, pension, antitrust, environmental and securities law, as well as federal Indian law.

The holding that the Tribe is not entitled to any relief on its contractual impairment claim, notwithstanding the illegality of Montana's "extraordinarily high" taxes and the findings that those taxes impaired the Tribe's ability to market its coal and to negotiate leases with Shell and other coal companies, has significant and far-reaching consequences. Allowing Montana to escape liability for its actions, which were undertaken with wrongful intent and interfered with the Tribe's federally secured rights to regulate and market its coal and to receive a large portion of the economic benefits of its mineral wealth,[4] thwarts the firm and overriding congressional policy of encouraging tribal self-government and economic development.[5]

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[4] *See Crow I*, 650 F.2d at 1112-14, Pet. App. 183-89; *Crow II*, 819 F.2d at 896, 898, Pet. App. 91, 95-96.

[5] The recovery of the taxes illegally collected from Westmoreland would not compensate the Tribe for the additional and separate injury resulting from the impairment of its ability to renegotiate its coal leases with Shell. Under the decisions below, there would not be any remedy for the enormous wrongs intentionally inflicted on the Tribe from 1975 through 1987 if there were no Westmoreland mine even though the Court of Appeals and this Court found that the illegal taxes had a negative effect on the marketability of tribal coal, interfered with the Tribe's leasing efforts, impermissibly limited the Tribe's ability to regulate the development of its coal

In the absence of any relief, the Tribe's injury in all likelihood will be permanent because the market for coal from the Powder River basins in Wyoming and Montana plummeted by the time the taxes were declared invalid 13 years after they were enacted, 10 years after the Tribe's suit was filed. ER 228s-228u. As recognized in several decisions of this Court and of the courts of appeals, other federal laws and policies similarly would be frustrated by the imposition of standards and burdens of proof which are difficult to meet because of the uncertainties created by the defendant's wrongful acts. Applying those standards to proof of causation (or injury) would severely limit or preclude relief to correct violations of federal law.

The Ninth Circuit's holding conflicts with this Court's decisions in *Bigelow, Mills* and other cases, particularly *J. Truett Payne Co., Inc. v. Chrysler Motors,* 451 U.S. 557 (1981). Justice Frankfurter *dissented* in *Bigelow* on the precise ground that this Court had erred by applying the principle that wrongdoers must bear the risk of the uncertainties created by their own wrongs to the determination of the fact of injury, i.e., causation, as opposed to the amount of damages. 327 U.S. at 267. The Ninth Circuit followed the *Bigelow* dissent rather than this Court's holding. The Ninth Circuit's decision also conflicts with the decisions of other federal appellate courts which have applied the *Bigelow* rule to causation and issues other than the determination of the amount of damages. There is no sound reason either in law or policy for the narrow and restricted interpretation of *Bigelow*

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resources and interfered with tribal economic development and autonomy.

and its progeny adopted by the Ninth Circuit in the instant case.

Similarly, there is no justification for limiting the analysis of causation applied by this Court in *Mills* to securities cases. To the contrary, the principles underlying *Mills* apply whenever courts are required to inquire about what would have happened if violations of federally secured rights had not occurred, especially where, as here, the vagaries of the business marketplace create difficult problems of proof. In these situations, doubts are properly resolved against the wrongdoer, in favor of the victim and in a manner that furthers the purpose of the underlying federal law or policy.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *BIGELOW* AND WITH SUBSEQUENT DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

It is firmly established as the law of this case that the Tribe's federally secured rights were wrongfully invaded by Montana's coal taxes and that Montana's illegal taxes injured the Tribe by impermissibly impairing its ability to negotiate coal leases with Shell and other coal companies. The issue presented in this conditional cross-petition concerns the standards, presumptions and burdens applicable to fashioning an appropriate remedy to make good that wrong. The Tribe's position is that the Ninth Circuit and the District Court erred by denying the Tribe a remedy for the contractual impairment wrong inflicted by Montana, by not recognizing that their findings establish that the Tribe was injured and by failing to resolve doubts regarding causation against the wrongdoer and in favor of the victim.

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992), a civil rights case, this Court reaffirmed the fundamental and longstanding principle of federal jurisprudence that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done," quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946). The origins of this rule were traced to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), and *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838). *See, Albemarle Paper Co. v. Moody*, 422 U.S. 405, 413-17 (1975) (where federal laws are violated, federal courts must exercise their remedial equitable powers to further the transcendent legislative purposes, not apply equity in a manner "which varies like the Chancellor's foot").

In circumstances where, as here, a wrong has occurred and the party whose federally secured rights were violated suffers an injury, the law favors the fashioning of monetary relief for the victim. As stated in *Bigelow*:

> The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights.

327 U.S. at 265.

The basis for adopting rules which encourage damage remedies to redress violations of federal law once a violation of a federal right and an injury are shown was

explained in *Chrysler Motors*, 451 U.S. at 566-67 (with citations omitted):

> Our willingness to accept a degree of uncertainty in . . . [*Bigelow* and other] cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land. The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's . . . violation. But our willingness also rests on the principle articulated in cases such as *Bigelow*, that it does not " 'come with very good grace' " for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.[6]

Neither of the factors described in *Chrysler Motors* supports the distinction made by the Ninth Circuit in the instant case between establishing causation (or injury) and proving the amount of damages. The difficulty of establishing what would have happened in the business world in the absence of the violation of federal law applies equally to both inquiries as does the inequity of the wrongdoer insisting upon specific and certain proof

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[6] In *Chrysler Motors*, unlike the case at bar, it was not clear whether the defendant was a wrongdoer or whether the plaintiff had been injured by an antitrust violation. 451 U.S. at 567 n.5, 568. The case was remanded for those determinations. If a violation were established, the "burden [of proving antitrust *injury and damages*] is to some extent lightened." 451 U.S. at 468 (emphasis added).

of the injury. Indeed, the second factor is more compelling as applied to causation because the failure to prove the fact of injury would defeat the entire claim.

The Ninth Circuit's decision below conflicts with the reasoning of *Chrysler Motors*. It is difficult to have sure knowledge of what would have transpired with the Crow/Shell lease in the absence of Montana's violations of the Tribe's rights. It is established, however, that the Tribe was injured because the illegal taxes impaired the Tribe's ability to negotiate the terms of its lease with Shell and Montana's taxes left less room for the Tribe and Shell to negotiate more favorable financial terms to the Tribe. *See supra* at 7, 9. As in *Chrysler Motors*, "[i]t does not come with very good grace" for Montana to insist upon specific and certain proof of the injury it inflicted. Shifting the burden of proof is required to avoid the inequity of allowing a wrongdoer to defeat the recovery of damages by insisting that the victim establish what would have happened in the absence of the violation of federal law. *Chrysler Motors*, 451 U.S. at 568.[7]

The state of the law regarding establishing damages after a violation of a federal right and an injury are shown was summarized in the concurring opinion of then Justice Rehnquist in *Albemarle Paper Co. v. Moody*, 422 U.S.

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[7] *Bigelow* also rests on the broader, "fundamental and unquestioned . . . principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong." *R.H. Sterns*, 291 U.S. at 61-62; *see also, Snepp v. United States*, 444 U.S. 507, 515-16 (1980). Not applying the *Bigelow* rule to proof of causation or injury substantially increases the probability that violators of federal laws will profit from their misdeeds.

405 (1975), a Title VII employment discrimination case. The question in *Albemarle* was whether back pay should be awarded once it was determined that the employer and labor union had unlawfully discriminated against black employees. Citing and quoting the *Bigelow* rule, Justice Rehnquist stated that an award of back pay "would follow virtually as a matter of course" from a finding that an employer had unlawfully discriminated contrary to Title VII. 422 U.S. at 442.

As explained in *Chrysler Motors* and succinctly summarized in the *Albemarle* concurrence, the *Bigelow* rule kicks in once a violation of a federal right and an injury have occurred. At that point, "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," *Bigelow*, 327 U.S. at 265, and an award of damages "follow[s] virtually as a matter of course." The lower courts erred by not applying this rule in the instant case.

Contrary to the appellate decision below, the *Bigelow* rule has not been limited to determining the amount of damages. Justice Frankfurter dissented in *Bigelow* on the precise ground that the Court did not observe what he viewed as the "decisive distinction . . . between proving that some damages were 'the certain result of the wrong' and uncertainty as to the dollars and cents value of such injuring wrong." 327 U.S. at 267 (citation omitted). The dissent's position was that the rule resolving doubts against the wrongdoer should be applied to the latter but not the former.[8] The Ninth Circuit erred by following the *Bigelow* dissent.

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[8] This precise issue was squarely presented to the *Bigelow* Court. The lower court had reversed judgment for the plaintiffs

This Court has not limited the *Bigelow* rule to proving the amount of damages. To the contrary, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 & n.7 (1962), this Court quoted the *Bigelow* rule with approval in the context of reversing the lower court's holding that there was insufficient evidence to support a finding that the defendant's allegedly wrongful conduct in fact caused injury to the plaintiff's business. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), this Court stated that the plaintiff's burden of proving the fact of damage "is satisfied by its proof of *some* damage flowing from the unlawful" act; "inquiry beyond this minimum point goes only to the amount and not the fact of damage." 395 U.S. at 114 n.9 (emphasis in original).[9] In

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on the sole ground that the evidence of damage or injury was not sufficient for submission to the jury. 327 U.S. at 254. The *Bigelow* defendants argued that it was impossible to establish any measure of damages because no one could know what would have happened if their violations had not occurred. 327 U.S. at 260-63. Over the dissent's objection, this Court applied the controlling legal principles regarding the standards and burdens of proof to both causation (or injury) and the amount of damages. Indeed, this Court cited with approval to the rule governing collisions between vessels, that where the offending vessel has violated regulations prescribed by statute, the wrongdoer may not object to the plaintiff's reasonable estimate of both the cause of injury and of its amount. 327 U.S. at 265.

[9] Applying this standard to the case at bar, the Tribe's burden of proving "*some* damage" was satisfied by the findings that Montana's illegal taxes impaired the Tribe's ability to negotiate coal leases with Shell and other coal companies and left less room for the Tribe and Shell to negotiate financial terms more favorable to the Tribe. The lower courts therefore erred by denying *any* recovery on the Tribe's contractual impairment claim.

addition, the *Zenith* Court cited and followed the *Bigelow* rule with regard to proof of the fact of damage and the existence of the necessary causal relation between the illegal act and the claimed damage. 395 U.S. 122-25; *see also, Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1113 n.* (1991) (Kennedy, J. concurring and dissenting); *Chrysler Motors;* and *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 143-44 (1968) (White, J. concurring). These decisions conflict with the appellate decision below and are consistent with *Bigelow*'s instruction that federal courts find "some way in which damages can be awarded where a wrong has been done." 327 U.S. at 265.

The Ninth Circuit's narrow application of the *Bigelow* rule also conflicts with the decisions of other circuits. In *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising Inc.*, 891 F.2d 1127, 1144 (4th Cir. 1989), *reversed on other grounds*, 499 U.S. 365 (1991), and *Metrix Warehouse v. Daimler-Benz Aktiengesellshaft*, 828 F.2d 1033, 1043 (4th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988), the Fourth Circuit applied the *Bigelow* rule in the context of causation and stated: "a wrongdoing defendant should not profit at the expense of his victim where it is his own . . . conduct that precludes direct and specific proof of damage." In *Thompson v. Missouri Bd. of Parole*, 929 F.2d 396, 401 (8th Cir. 1991), and *United States ex rel. Schuster v. Vincent*, 524 F.2d 153, 160 (2d Cir. 1975), *Bigelow* was cited for the broad rule that "equity . . . resolves uncertainties against those whose wrongful acts or omissions created them." In these latter two cases, the *Bigelow* rule was applied in favor of prisoners seeking habeas corpus in situations not involving any damage claim. The Seventh Circuit followed the *Bigelow* rule in the context of causation in

Switzer Brothers, Inc. v. Locklin, 297 F.2d 39, 47 (1961), *cert. denied*, 369 U.S. 851 (1962), as did First Circuit in *Haverhill Gazette Company v. Union Leader Corp.*, 333 F.2d 798, 805-07 & n.16 (1964), *cert. denied*, 379 U.S. 931 (1964).[10]

The holding of the Ninth Circuit limiting the *Bigelow* rule to proof of the amount of damages, as opposed to causation or injury, therefore conflicts with decisions of this Court and with several courts of appeals. The applicability of the *Bigelow* rule to proof of causation (or injury) presents a significant question which arises in

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[10] *United States Football League v. National Football League*, 842 F.2d 1335 (2d Cir. 1988), is a mixed bag in terms of its relationship to the instant case. On the one hand, it followed *Zenith* by approving a jury instruction that plaintiffs in an antitrust case do not have to prove that the unlawful activity was the sole cause of injury or that it was a greater cause than other factors. They only have to show that their injuries "to *some* degree" resulted from defendants' violations. 842 F.2d at 1377 (emphasis in original). This standard, which clearly was satisfied in the instant case, conflicts with the requirement imposed by the courts below that the illegal conduct must be the primary or major, if not the sole, cause of the injury. On the other hand, the Second Circuit also stated that the *Bigelow* rule applies to determining the amount of damages. 842 F.2d at 1378, 1379. In this latter respect, it comes closer than any other reported decision of the courts of appeals of which the Tribe is aware to the holding of the Ninth Circuit below. The Second Circuit's interpretation of *Bigelow*, however, occurs in the context of a discussion of the need for the plaintiff in an antitrust action to segregate the amount of damages reasonably attributable to lawful competition or other factors, such as management problems or unsuccessful business strategies, from those attributable to unlawful acts. That requirement, which goes to determining the amount of damages, not injury, has not been raised or considered in the instant case.

many areas and potentially affects everyone injured by a violation of federal law who may seek monetary recovery. The issue warrants review by this Court if the petition filed by Montana and Big Horn County is granted.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *MILLS*.

This Court specifically addressed the causation issue in the context of fashioning an appropriate equitable remedy for a violation of a federal law in a business setting in *Mills*. Minority shareholders brought suit alleging that the proxy statement soliciting shareholders' votes in favor of a merger was misleading and violated a provision of the Securities Act and an implementing regulation. The District Court held that the proxy statement was defective in a material way and that a causal relationship had been shown by proof that the votes of a substantial number of minority shareholders had been necessary for approval of the merger. While the Court of Appeals affirmed the ruling that the proxy statement was materially deficient, it concluded that it was not practical to inquire into the extent to which thousands of individuals had relied on the defective aspects of the proxy statement in casting their votes. In lieu of determining causation, the Court of Appeals held that the issue would be resolved by proof of the fairness of the terms of the merger. If the District Court found that the merger was fair, it would be justified in concluding that it would have been approved if the proxy statement had not been materially defective.

This Court rejected both solutions to the problems posed by the causation issue. The Court of Appeals' decision "would subvert the congressional purpose of ensuring full and fair disclosure to shareholders." 396 U.S. at 381-83. This Court held that the finding that the misleading aspect of the proxy statement was material sufficed to establish the minority shareholders' cause of action. "There is no need to supplement this requirement, as did the Court of Appeals, with a requirement of proof of whether the defect actually had a decisive effect on the voting." 396 U.S. at 384-85. This Court's objective test was found more practical to administer and adjudicate. In addition, "by resolving doubts in favor of those the statute is designed to protect, [it] will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions." 396 U.S. at 385. The case was remanded to the District Court to fashion an appropriate equitable remedy that effectuated the congressional purpose. 396 U.S. at 386.

Although *Mills* does not cite to *Bigelow*, its reasoning and result are consistent with and supported by the *Bigelow* rule. It applies the principle of "resolving doubts in favor of those the statute is designed to protect" to proof of causation (or injury).

As previously noted (*supra* at 11), the Ninth Circuit rejected the Tribe's reliance on *Mills* on the ground that it was a securities case. *Crow IV*, 92 F.3d at 830 n.4., Pet. App. 13. There is no doubt that the purposes and policies of the federal law that was violated are important factors

in formulating appropriate equitable relief. *See, e.g., Albemarle*, 422 U.S. at 413-17, summarized *supra* at 15.[11] But the issue now posed in the instant case is not the precise form the remedy should take. Rather, the question is what standards of proof are applicable to determining whether all relief should be precluded due to the difficulty of establishing "what plaintiff's situation would have been in the absence of the defendant's . . . violation." *Chrysler Motors*, 451 U.S. at 566-67, *quoted supra* at 16. *Mills* supports application of the *Bigelow* rule to the issue of causation (or injury) whenever a wrongdoer in a business context seeks to escape responsibility for its violation of federal law by "insist[ing] upon specific and certain proof of the injury which it itself has inflicted." *Chrysler Motors*, 451 U.S. at 566-67. There is no reason in law or in policy to distinguish between violations of securities laws and other invasions of federally secured rights.

Whether this Court's analysis of proof of causation in *Mills* should be applied generally in fashioning appropriate equitable relief once a violation of federal law is established presents an important issue. It merits review if this Court grants the petition filed by Montana and Big Horn County.

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[11] If the application of strict standards and burdens of proof results in the wrongdoer avoiding any liability for its invasion of federally secured rights, the purposes and policies of the law always would be frustrated. *See, e.g., Franklin*, 503 U.S. at 66-67. That is as true here as it was in *Mills*. *See supra* at 12 n.5.

CONCLUSION

In the process of distinguishing and severely restricting the applicability of this Court's holdings in *Bigelow* and *Mills*, the Ninth Circuit erected formidable barriers to victims obtaining equitable relief to correct invasions of their federally secured rights. The existence of these barriers in the Nation's most populous circuit court of appeals undermines "[t]he constant tendency of the courts . . . to find some way in which damages can be awarded where a wrong has been done." *Bigelow*, 327 U.S. at 265.

For the foregoing reasons, the conditional cross-petition for a writ of certiorari should be granted if this Court grants the petition filed by Montana and Big Horn County (No. 96-1829).

Respectfully submitted,

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June 1997.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE CROW TRIBE OF INDIANS, Plaintiff-Appellant, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. STATE OF MONTANA, Director, Ken Nordtvedt; COUNTY OF BIG HORN; TREASURER, BIG HORN COUNTY, MARTHA FLETCHER, Defendants-Appellees.	No. 95-35093 D.C. No. CV-78-00110-BLG
THE CROW TRIBE OF INDIANS, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor-Appellant, v. STATE OF MONTANA, Director, Ken Nordtvedt; COUNTY OF BIG HORN; TREASURER, BIG HORN COUNTY, MARTHA FLETCHER, Defendants-Appellees.	No. 95-35096 D.C. No. CV-78-00110-JDS ORDER (Filed Nov. 21, 1996)

Before: BROWNING, WRIGHT, and CANBY, Circuit Judges

The "Petition for Rehearing of the Crow Tribe of Indians" filed October 29, 1996, is DENIED.

UNITED STATES CODE TITLE 25 – INDIANS – CHAPTER 12: "LEASE, SALE, OR SURRENDER OF ALLOTTED OR UNALLOTTED LANDS" 25 U.S.C. §§ 396(a)-(g)

§ 396a Leases of unallotted lands for mining purposes; duration of leases

On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

§ 396b Public auction of oil and gas leases; requirements

Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the

highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title.

§ 396c Lessees of restricted lands to furnish bonds for performance

On and after May 11, 1938, lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds, in amounts satisfactory to the Secretary of the Interior, guaranteeing compliance with the terms of their leases: Provided, That personal surety bonds may be accepted where the sureties deposit as collateral with the said Secretary of the Interior any public-debt obligations of the United States guaranteed as to principal and interest by the United States equal to the full amount of such bonds, or other collateral satisfactory to the Secretary of the Interior, or show ownership to unencumbered real estate of a value equal to twice the amount of the bonds.

§ 396d Rules and regulations governing operations; limitations on oil or gas leases

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

§ 396e Officials authorized to approve leases

The Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

§ 396f Lands excepted from leasing provisions

Sections 396a, 396b, 396c, and 396d of this title shall not apply to the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and

asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma.*

§ 396g Subsurface storage of oil or gas

The Secretary of the Interior, to avoid waste or to promote the conservation of natural resources or the welfare of the Indians, is authorized in his discretion to approve leases of lands that are subject to lease under section 396 or 396a of this title, for the subsurface storage of oil and gas, irrespective of the lands from which initially produced, and the Secretary is authorized, in order to provide for the subsurface storage of oil or gas, to approve modifications, amendments, or extensions of the oil and gas or other mining lease(s), if any, in effect as to restricted Indian lands, tribal or allotted, and may promulgate rules and regulations consistent with such leases, modifications, amendments, and extensions, relating to the storage of oil or gas thereunder. Any such leases may provide for the payment of a storage fee or rental on such stored oil or gas or, in lieu of such fee or rental, for a royalty other than that prescribed in the lease when such stored oil or gas is produced in conjunction with oil or gas not previously produced. It may be provided that any oil and gas lease under which storage of oil or gas is so authorized shall be continued in effect at least for the period of such storage use and so long thereafter as oil or

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* This provision was amended by the Act of September 16, 1959, 73 Stat. 567, and the Act of May 17, 1968, 82 Stat. 123, to remove the exception for the Crow Indian Reservation. *See, Crow I,* 650 F.2d at 1111 n.6.

gas not previously produced is produced in paying quantities.

Supreme Court, U.S.
FILED
AUG 13 1997

Nos. 96-1829 and 96-1984

In the Supreme Court of the United States

OCTOBER TERM, 1996

MONTANA, ET AL., PETITIONERS

v.

CROW TRIBE OF INDIANS, ET AL.

CROW TRIBE OF INDIANS,
CONDITIONAL CROSS-PETITIONER

v.

MONTANA, ET AL.

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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29 pp

QUESTIONS PRESENTED

1. Whether the State of Montana and Bighorn County were properly required to surrender to the Crow Tribe of Indians the proceeds of illegal taxes that they imposed on the Tribe's coal and that were paid by Westmoreland Resources, Inc., which extracted the coal pursuant to a lease agreement with the Tribe.

2. Whether the district court and the court of appeals properly concluded that the imposition of the illegal taxes did not cause the failure of the Tribe to receive royalties from Shell Oil Company pursuant to other coal-mining leases that never resulted in mining operations.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

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ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 92 F.3d 826, amended, 98 F.3d 1194. The opinion of the district court (Pet. App. 17-57) is unreported.

Previous decisions in the case include (1) the initial decision of the district court (Pet. App. 197-227), reported at 469 F. Supp. 154; (2) an opinion by the court of appeals reversing and remanding that decision (Pet. App. 167-196), reported at 650 F.2d 1104, amended, 665 F.2d 1390 (*Crow I*); (3) the decision of the district court on remand (Pet. App. 110-166), reported at 657 F. Supp. 573; (4) an opinion by the court of appeals reversing and remanding that decision (Pet. App. 88-109), reported at 819 F.2d 895 (*Crow II*); (5) a memorandum order of this Court (Pet. App. 87), summarily affirming the judgment in *Crow II*, reported at 484 U.S. 997; (6) an unreported opinion of the district court on remand (Pet. App. 67-86), and an unreported order of certification for interlocutory appeal (Pet. App. 61-66); and (7) an opinion by the court of appeals dismissing the interlocutory appeal (Pet. App. 58-60), reported at 969 F.2d 848 (*Crow III*).

JURISDICTION

The judgment of the court of appeals (Pet. App. 2) was entered on August 6, 1996. Petitions for rehearing were denied on November 21, 1996 and February 21, 1997. Pet. App. 228-229; Cross-Pet. App. 1-2. The petition for a writ of certiorari in No. 96-1829 was filed and docketed on May 16, 1997. The conditional cross-petition for a writ of certiorari in No. 96-1984 was filed on June 13, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. In 1972, the Crow Tribe of Indians (Tribe) and Westmoreland Resources, Inc. (Westmoreland) entered into a coal-mining lease agreement pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.* (authorizing leasing of Indian lands for

mining purposes). Pet. App. 171, 199. The agreement granted Westmoreland the right to extract coal located in an area known as the "ceded strip," which is adjacent to the surface boundaries of the Tribe's Reservation in Montana. *Ibid.* The surface of the ceded strip was once part of the Tribe's Reservation, but was subsequently ceded to the United States for settlement, primarily by non-Indians. *Ibid.* The mineral rights in the ceded strip are held in large part by the United States in trust for the Tribe. *Ibid.* The minerals are legally a part of the Tribe's Reservation. *Id.* at 195.

The original lease was renegotiated in 1974, and Westmoreland began mining operations. Pet. App. 122. In 1975, Montana enacted statutes imposing a severance tax and a gross proceeds tax on all coal produced in the State, including coal belonging to the Tribe.[1] *Id.* at 6, 23. Those statutes were adopted despite the opposition of the Tribe, which objected to Montana's taxation of tribal resources. *Id.* at 23. The Montana legislature was aware, at the time it enacted the tax statutes, that their legality as applied to tribal resources would subsequently be determined by the courts. *Id.* at 9.

Westmoreland began paying gross proceeds taxes in 1975 and severance taxes in 1976. Pet. App. 23-27. During the period from 1975 to 1982, the severance tax rate was 30% of the contract sales price of the coal extracted by Westmoreland, while the gross proceeds tax rate was approximately 5% of the con-

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[1] Although it was enacted pursuant to state statute, the gross proceeds tax was ultimately payable to petitioner Big Horn County. Pet. App. 19-20, 25-27. For ease of reference, the petitioners are referred to collectively as "Montana."

tract sales price. *Id.* at 25-26. Montana set the severance tax rate at 30% because it intended to "appropriate most of the economic rent"[2] from tribal coal. *Id.* at 10, 185. During the period from 1975 to 1982, Westmoreland paid $46.8 million in severance taxes and $11.4 million in gross proceeds taxes. *Id.* at 24-27. A significant percentage of the severance taxes was placed in a trust fund containing only the proceeds of severance taxes imposed on Montana coal producers. *Id.* at 24-25, 173. As of June 30, 1993, the book value of that trust fund was in excess of $500 million. *Id.* at 25.

In 1976, the Tribe enacted its own severance tax of 25% of the contract price of coal mined on the Reservation. Pet. App. 19. That tax was originally approved by the Department of the Interior only as to coal located within the surface boundaries of the Tribe's Reservation, and not as to coal located under the ceded strip. *Id.* at 93. The Department of the Interior's refusal to approve the Tribe's tax as to coal extracted from the ceded strip was later determined to be erroneous, and "at all relevant times the Tribe had a valid coal mining tax applicable to Westmoreland's mining on the Ceded Strip." *Id.* at 36. Westmoreland did not pay taxes to the Tribe, however, because it disputed the validity of the Tribe's tax as applied to coal extracted from the ceded strip, and because it wished to avoid concurrent taxation. *Id.* at 31.

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[2] "'Economic rent' is the amount of revenue that can be extracted from an activity, here in the form of royalties and taxes, without significantly discouraging production." Pet. App. 185 n.12.

2. In 1978, the Tribe filed a suit challenging the legality of the severance and gross proceeds taxes, arguing that the taxes were preempted by federal law. Pet. App. 19. The district court dismissed the complaint for failure to state a claim. *Id.* at 197-227. The Tribe appealed to the Ninth Circuit, which reversed and remanded. *Id.* at 167-196. Specifically, the Ninth Circuit held that the Tribe had alleged facts which, if proven, would establish that the challenged taxes were preempted by the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.*, and infringed the Tribe's right of self-government. Pet. App. 185-196.

In 1982, after the decision in *Crow I*, the Tribe and Westmoreland entered into an amended lease, pursuant to which Westmoreland agreed to pay to the Tribe a tax equal in amount to the coal taxes imposed by Montana. Pet. App. 31-32. The agreement also, however, permitted Westmoreland to claim a credit against the tribal tax for any severance and gross proceeds taxes it paid to Montana. *Id.* at 32.

In January 1983, the district court enjoined Westmoreland's payment of the state severance tax, and ordered Westmoreland to deposit into the registry of the court amounts equal to those payable under the severance tax.[3] Pet. App. 35. Also in 1983, the United States intervened on behalf of the Tribe in order to protect the United States' interests as trustee of the coal upon which Montana's taxes were levied. Pet. 5 n.2.

3. After a trial in January 1984, the district court once again concluded that application of the severance and gross proceeds taxes to tribal coal extracted from

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[3] A similar order was entered as to the gross proceeds tax in 1987. Pet. App. 35.

the ceded strip was not preempted by federal law. Pet. App. 110-166. The Tribe appealed, and the court of appeals once again reversed. *Id.* at 88-109. In reversing, the court of appeals held that the severance and gross proceeds taxes on the Tribe's coal

> increase the costs of production by the coal producers, reducing in turn the royalty that can be paid the Tribe. The taxes also forced the coal producers to charge higher prices, reducing the demand for their Montana coal and resulting in fewer sales for the producers and fewer royalties to the Tribe.

Id. at 97. Because the taxes interfered with the "firm federal policy of promoting tribal self-sufficiency and economic development," *id.* at 95, the court of appeals held that they were presumptively preempted, unless supported by a sufficient state interest, *id.* at 100.

The court of appeals further held that Montana had not carried the "heavy burden" of establishing that its taxes on the Tribe's coal were narrowly tailored to support legitimate state interests. Pet. App. 103. To the contrary, the evidence indicated that the coal taxes were not necessary to compensate Montana for the costs created by coal mining, since Montana's revenues from state, local, and excise taxes on the mining activity were more than sufficient to offset the coal-related costs documented by Montana. *Id.* at 103-105. In addition, most of the revenue from the challenged taxes was devoted to purposes other than environmental or coal-related services. *Id.* at 104. Thus, the court of appeals concluded, Montana imposed its taxes on the Tribe's coal "to profit from the Indians' valuable coal resources." *Ibid.* Because Montana had no legitimate interest in appropriating

the Tribe's mineral wealth, the court held, Montana's severance and gross proceeds taxes were not narrowly tailored to advance legitimate state interests, and were preempted by federal law. *Id.* at 105. For similar reasons, the court of appeals held that the taxes were an unlawful infringement upon the Tribe's sovereignty. *Id.* at 105-107.

4. Montana appealed to this Court, which summarily affirmed the judgment of the court of appeals. Pet. App. 87. The case then returned to the district court for further proceedings. In 1989, the district court turned over to the Bureau of Indian Affairs, as trustee for the Tribe, the tax payments that Westmoreland had been depositing into the court's registry pursuant to the district court's earlier orders. *Id.* at 35. Those funds represented Westmoreland's severance tax payments beginning in 1983 and its gross receipts tax payments beginning in 1987, along with accumulated interest. *Ibid.*

The parties then turned their attention to the coal-tax payments Westmoreland had made during the period between 1975 and the date of the orders directing Westmoreland to deposit its tax payments into the court registry. The United States and the Tribe filed amended complaints in which they sought to recover those payments, which totalled approximately $58 million. Pet. App. 24-27, 243-260. They argued that the taxes had been determined to be unlawful, that Montana therefore was not entitled to retain the proceeds of the taxes, that the taxes had substantially injured the Tribe, and that the Tribe, as owner of the coal that had been unlawfully taxed, was legally and equitably entitled to the proceeds of the unlawful taxes. *Id.* at 243-260.

Montana moved for summary judgment on various grounds, including that the district court lacked jurisdiction over what were, in reality, state law claims for restitution, and that in any event the Tribe and the United States had failed to make out the essential elements of the theories of restitution upon which they had relied. Pet. App. 72. The district court denied the motion for summary judgment, holding that the Tribe's request for restitution sounded in federal law, invoking the federal courts' "broad equitable powers to construct a remedy" for the violation of a federal law. *Id.* at 76. The district court further concluded that its power to fashion an equitable remedy under federal law was not limited by the scope of state-law causes of action for restitution. *Id.* at 79-84. Finally, the district court ruled that the question of what equitable remedy, if any, would be appropriate turned on unresolved factual matters. *Id.* at 85.

The district court certified its order denying summary judgment for interlocutory appeal. Pet. App. 61-66. Although it originally granted permission for an interlocutory appeal, the court of appeals subsequently concluded that permission to appeal had been improvidently granted, and dismissed the appeal. *Id.* at 58-60. In dismissing the appeal, the court of appeals ruled that it had already addressed the claim that the Tribe could not recover the proceeds of Montana's illegal taxes because the Tribe had not paid the taxes. *Id.* at 59-60. Citing its earlier opinions in *Crow I* and *Crow II*, the court of appeals indicated that the Tribe was entitled to such recovery because Montana's illegal taxes on tribal coal had taken revenue from the Tribe. *Ibid.*

5. The case returned to the district court, which conducted a second trial in 1994. Pet. App. 22-23.

There were two principal issues at that trial. The first was whether the Tribe was equitably entitled to the proceeds of Montana's illegal taxes on the Tribe's coal. *Id.* at 23-38, 43-54. The second was the Tribe's separate claim that Montana's coal taxes had unlawfully interfered with the Tribe's business and contractual relationship with Shell Oil Company (Shell), thereby causing the Tribe to lose revenues it would have received from coal-mining activities that would have occurred under leases with Shell but for Montana's illegal taxes. *Id.* at 38-42, 54-57.

The district court ruled against the Tribe on both issues. With respect to the proceeds of Montana's illegal coal taxes, the district court relied on a number of factors that it believed undermined the Tribe's claim of an equitable entitlement: (1) the Tribe did not provide significant governmental services to the ceded strip; (2) Montana's coal severance tax had been found to be lawful, as against Commerce Clause and Supremacy Clause challenges, in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981); (3) Montana provides certain governmental services to the Tribe; (4) the illegality of Montana's coal taxes was not obvious during the relevant period; (5) the Tribe did not pay the taxes at issue, and Westmoreland, which had paid the taxes, had not sought to avoid or recover them; (6) the Tribe could have taken steps to try to cause Westmoreland to challenge Montana's taxes; and (7) even if Montana had not imposed the coal taxes, the Tribe would not have been able to impose a tax on the coal mined by Westmoreland, because the Department of the Interior had not approved the Tribe's effort to impose such a tax on coal mined in the ceded strip. Pet. App. 47-52.

As to the Tribe's claim regarding its efforts to negotiate coal-mining leases with Shell, the district court found that the coal taxes did not cause those efforts to fail. Pet. App. 42, 56. Specifically, the district court found that although Shell and the Tribe entered into a coal-mining lease agreement in 1972, the Tribe declared that lease invalid in 1974, before Montana imposed the taxes at issue. *Id.* at 38-39. The Tribe's decision to declare the lease invalid was prompted by its dissatisfaction with the terms of the lease, in particular by concerns about the impact of the lease on its sovereignty given that mining activities under the lease were to be conducted within the Reservation. *Id.* at 39.

The Tribe subsequently challenged the legality of the 1972 Shell lease in federal court, obtaining a judgment vacating the lease on the ground that applicable federal regulations had not been followed. Pet. App. 39-40. The Tribe and Shell sought to agree on new lease terms, but those negotiations were delayed by disagreements over "acreage size, options on additional tracts, tribal control over mining operations, and tribal ordinance restrictions." *Id.* at 41. Although Montana's coal taxes "left less room" for the Tribe and Shell to negotiate financial terms favorable to the Tribe, the district court found that the taxes were not responsible for the Tribe's loss of revenue due to the protracted negotiations between the Tribe and Shell.[4] *Ibid.* That delay, and the ultimate failure

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[4] Ultimately, the Tribe and Shell negotiated a new lease agreement, in 1980. Pet. App. 41. Shell never commenced operations under that agreement, however, and it relinquished its rights under the agreement in 1985. *Id.* at 41-42.

of Shell to conduct mining operations, were the result of other "causative factors." *Id.* at 42.

6. The Tribe and the United States appealed the judgment of the district court, and the court of appeals reversed in part and affirmed in part. Pet. App. 1-16. With respect to the proceeds from the illegally imposed taxes, the court of appeals held that the district court had erred in concluding that the Tribe was not equitably entitled to them. *Id.* at 7-12. Although the Tribe had not paid the taxes at issue, it had stated a claim for equitable relief, the court of appeals held, because the taxes "had an adverse impact on the Tribe's ability to market its coal, increased the costs of coal production, and reduced the royalty the Tribe could charge, 'taking revenue that would otherwise go towards supporting the Tribe and its programs.'" *Id.* at 11 (quoting *Crow II*, 819 F.2d at 902).[5]

The court of appeals further held that the factors the district court relied upon to reach a contrary conclusion were either irrelevant or contrary to earlier holdings of the court of appeals. Pet. App. 7-

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[5] The court of appeals distinguished *United States* v. *California*, 507 U.S. 746 (1993). There, this Court held that although the United States had reimbursed a government contractor for state taxes the contractor had paid to California, it could not recover those taxes in federal court, because the contractor had settled its tax liability with California, there was no claim that California's taxes violated federal law, and the United States had failed to seek tax relief under applicable state procedures. *Id.* at 751-759. The court of appeals in this case pointed out that *California* was a case in which the United States had voluntarily agreed to reimburse its contractor, while the Tribe in this case had done nothing comparable. Pet. App. 16. It also pointed out that there had been no determination in *California* that California's tax was unlawful. *Id.* at 8 n.2.

12. Specifically, the court of appeals concluded that the trial court had ignored direct evidence that the Montana legislature was aware that its coal taxes were potentially preempted, and had not put the contested revenues in escrow until well after the Tribe's lawsuit was underway. *Id.* at 9 & n.3. The court of appeals also emphasized its earlier holding, in *Crow I*, that Montana's coal taxes were "intentionally and illegitimately levied to appropriate most of the economic rent from Tribal coal." *Id.* at 10.

The court of appeals rejected the district court's reliance on the fact that Montana provided government services to the Tribe, because Montana would have furnished those services even if there had been no coal mining. Pet. App. 10-11. Similarly, the costs to Montana of any coal-related services were more than offset by revenues from coal-related taxes other than those at issue. *Id.* at 11. In sum, the court of appeals concluded:

> The equities in favor of restoring improperly collected revenues to the entity entitled to receive them are strong. Montana levied the unlawful taxes with the illegitimate intent of appropriating most of the economic rent from the Tribe's coal and the State benefitted from its wrong. The legitimate claim of the State on profits from the Tribe's coal is minimal and the Tribe's interest is strong.

Id. at 12.

The court of appeals therefore remanded the case for entry of an order directing Montana and Big Horn County to disgorge the illegally obtained taxes. Pet. App. 12. The court of appeals did not resolve outstanding disputes about whether the Tribe was entitled to

prejudgment interest and attorney's fees. *Id.* at 12, 14.

Finally, the court of appeals affirmed the district court's denial of the Tribe's claim for relief with respect to Shell Oil. The court of appeals agreed with the district court that the Tribe had failed to show that the illegal coal taxes were the cause of the breakdown of the relationship between the Tribe and Shell. Pet. App. 12-14.[6]

ARGUMENT

Petitioners no longer dispute that they obtained $58 million through illegal taxes assessed on coal owned by the Tribe. They no longer dispute that their "unique," "unusually large," and "extraordinarily high" taxes "imposed a substantial burden on the Tribe." *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 186 & n.17 (1989).[7] They seek review solely

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[6] The court of appeals distinguished two cases upon which the Tribe had relied in support of its argument that Montana should bear the burden of proving that its illegal taxes did not result in the breakdown of the relationship between the Tribe and Shell. Pet. App. 13 n.4 (discussing *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946), and *Mills* v. *Electric Auto-Light Co.*, 396 U.S. 375, 381-385 (1970)). The court of appeals distinguished *Bigelow* on the ground that the relaxed approach *Bigelow* took to the plaintiff's burden of proof was limited to proof of damages, and did not apply to the plaintiff's burden of establishing causation. *Ibid.* It distinguished *Mills* on the ground that the principles announced in that case, involving securities law, should not be extended into the present context. *Ibid.*

[7] The discussion of Montana's coal taxes in *Cotton Petroleum* was part of this Court's explanation of the differences between those taxes, which this Court had previously found to be unlawful, and the tax imposed by New Mexico on tribal

of the question whether they should nevertheless be permitted to retain the profits of their wrongdoing. The court of appeals correctly ruled that they must instead return those profits to the Tribe, the owner of the coal from which petitioners had "intentionally and illegitimately * * * appropriate[d] most of the economic rent." Pet. App. 10. Because the court of appeals' decision is consistent with the decisions of this Court and other circuits, and turns on the unique factual circumstances surrounding petitioners' illegal taxation of coal owned by the Tribe, this Court's review is not warranted.

The Tribe's conditional cross-petition does not, in any event, warrant review. The court of appeals' ruling that the Tribe was not entitled to recover damages in connection with the failed Shell lease rests on the factual conclusions of that court and the district court that the coal taxes did not cause the failure of that lease. Those factual conclusions do not merit further review. Nor does the ruling of the court of appeals conflict with decisions of this Court which have in certain contexts eased plaintiffs' burden of proving causation and damages.

1. Petitioners contend that the decision of the court of appeals conflicts with this Court's decision in *United States* v. *California*, 507 U.S. 746 (1993). That contention is erroneous.

In *California*, the United States sought to recover taxes that a federal contractor had paid to the State of California. 507 U.S. at 749. As this Court repeatedly emphasized, the state taxes at issue in that case were not alleged to have violated any federal right or

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leases of natural resources, which the Court upheld in *Cotton Petroleum*. 490 U.S. at 186 & n.17.

sovereign interest of the United States. *Id.* at 748 ("we are not presented with a claim that the state tax is unconstitutional"), 749, 752-753, 757-758.[8] Rather, the United States' claim was that the taxes were invalid as a matter of state law, and that the United States should be permitted to assert that claim in federal court because it had agreed to reimburse the contractor for costs, including state taxes. *Id.* at 751.

This Court held that the United States was not entitled to recover the taxes. *California*, 507 U.S. at 751-760. In reaching that conclusion, the Court held that the United States' voluntary decision to agree to reimburse its contractor for state taxes did not give rise to "a federal cause of action for money had and received to recover state taxes paid by" the contractor. *Id.* at 754. The Court further pointed out that although the United States had a right to be subrogated to the contractor's claim against California, the contractor had settled its claim with California. *Id.* at 756. Because the contractor's "rights have lapsed and its claims are barred," the Court held, general subrogation principles barred recovery by the United States. *Ibid.* Moreover, although general subrogation principles do not necessarily apply to the United States acting in its sovereign capacity, the United States was not acting in its sovereign capacity when it agreed to reimburse the contractor for state taxes. *Id.* at 757-758. Finally, the Court held that the United States' delay in bringing its federal suit was an

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[8] In fact, such a claim was unavailable in *California*, because this Court had previously held, in *United States* v. *New Mexico*, 455 U.S. 720, 733-735 (1982), that the States may tax federal contractors even if the burden of such taxes ultimately falls upon the United States.

equitable consideration supporting a conclusion that suit was barred. *Id.* at 759.

California is entirely consistent with the decision of the court of appeals in this case. Unlike the present case, *California* involved a state tax that was not claimed to violate federal law. Thus, the issue in *California* was whether the Court should recognize a cause of action under federal common law permitting the United States to attempt to recover state taxes it claimed its contractor should not have been required to pay as a matter of state law. 507 U.S. at 752.

In contrast, the Tribe and the United States in this case established that Montana's taxes violated federal law, by undermining tribal sovereignty and frustrating the purposes of federal statutes. The Tribe and the United States further established that Montana's illegal taxes injured the Tribe seriously, by significantly reducing the revenue it obtained from its mineral resources. The relief granted to the Tribe is properly understood as an exercise of the broad equitable authority of the federal courts to remedy violations of federal law. The existence and breadth of that equitable authority is beyond debate. See, *e.g.*, *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 399 (1946) ("Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief."); *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992) ("[in a] long line of cases * * * the Court has held that if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief").

Petitioners, however, incorrectly understand this case as one involving an independent cause of action for restitution, sounding in federal common law. Pet. 2, 13-18. Although the source of the request for relief has not always been precisely specified during the course of these protracted proceedings, there can be no serious question that the Tribe and the United States sought to invoke the remedial authority of the federal courts to remedy a violation of federal rights. See, *e.g.*, Pet. App. 253 (in fourth amended complaint, Tribe indicates that it seeks "restitution and equitable relief," and that its claim for that relief arises from provisions of federal law violated by Montana's illegal taxes); *id.* at 74-85 (in rejecting Montana's claim that Tribe's request for restitution was solely matter of state law, district court states that "[h]aving established a violation of significant tribal interests based upon treaty and federal law, this Court has broad equitable powers to construct a remedy patterned after a state common law remedy").

In sum, petitioners' claim that the decision of the court of appeals conflicts with this Court's decision in *California* reflects a "misunderstanding over the difference between a cause of action and the relief afforded under it." *Franklin*, 503 U.S. at 69. When that misunderstanding is corrected, petitioners' claim of conflict evaporates.[9] *California*'s refusal to recog-

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[9] A similar misunderstanding is exhibited by the brief filed by *amici curiae* in support of the petition (at 1). There, *amici* claim that the ruling of the court of appeals means that any person suffering injury as a result of an unlawful state tax imposed on a third party would have a cause of action under federal common law for recovery of the taxes paid by the third party. The holding of the court of appeals suggests nothing of the sort. Rather, it simply reaffirms the broad equitable

nize a cause of action under federal common law in the circumstances before it (which involved only an alleged violation of state law) in no way conflicts with the ruling of the court of appeals granting the United States and the Tribe an equitable remedy with respect to an established violation of federal law.[10]

2. Petitioners also claim that the decision of the court of appeals conflicts with *Ute Indian Tribe* v. *State Tax Commission*, 574 F.2d 1007 (10th Cir.), cert. denied, 439 U.S. 965 (1978). That claim, too, is incorrect. In *Ute*, the Ute Tribe challenged the lawfulness of Utah's sales tax as applied to sales by a tribal enterprise located within a reservation. 574 F.2d at 1008-1009. The Tenth Circuit held that the

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authority of the federal courts to fashion remedies for violations of federal law.

[10] There are other significant distinctions between the present case and *California*. In *California*, the United States had voluntarily chosen to indemnify its contractor for state taxes, while in the present case Montana's illegal coal taxes were imposed over the Tribe's opposition. In *California*, the United States had failed to take advantage of administrative and state court proceedings in which it could have contested the legality of the state tax at issue, and had waited for years after the taxes were demanded to seek relief in federal court. 507 U.S. at 751, 756-759. In contrast, the Tribe in the present case promptly challenged the legality of Montana's coal taxes in the appropriate forum. Finally, in *California*, the United States was seeking relief not in its sovereign capacity, but rather simply in virtue of its contractual arrangements with a private party. *Id.* at 757. In the present case, the Tribe is seeking relief from illegal coal taxes that were found to have "impermissibly eroded the Tribe's sovereign authority." Pet. App. 6. These differences fully justify the court of appeals' observation that "*California* involved an entirely different factual situation" from that of the present case. *Id.* at 16.

tax was lawful as to sales to non-Indians but unlawful as to sales to Indians. *Id.* at 1009.

The Ute Tribe sought not only to enjoin the unlawful taxes, but also to obtain from the State the proceeds from the taxes that had been unlawfully imposed. 574 F.2d at 1009. The Tenth Circuit rejected the latter claim in a single paragraph, on the ground that the funds "were paid by the buyers of the goods and not by the sellers. If anyone can seek recovery or refund, it is these buyers." *Ibid.*

Ute differs from the present case in a critical respect: there is no suggestion in *Ute* that the sales tax at issue there had any adverse effect on the Ute Tribe as a whole. In contrast, in the present case, Montana's illegal coal taxes were imposed upon property owned by the Tribe, and were found to have substantially diminished the value of the property and the revenue the Tribe would otherwise have received from it. The Tenth Circuit's conclusion that the Ute Tribe could not recover illegal sales taxes paid by its individual members does not conflict with the remedy ordered by the court of appeals in the very different circumstances of the present case.

3. Petitioners claim that the ruling of the court of appeals presents important and novel issues meriting this Court's review. Pet. 19-21. To the contrary, the ruling of the court of appeals reflects the application of well established general principles to the unique circumstances of the present case. Further review is not warranted.

There is nothing novel about the court of appeals' exercise of equitable authority to require petitioners to surrender the proceeds of their illegal taxes. See *Ward* v. *Board of County Commissioners*, 253 U.S. 17, 21-24 (1920) (federal courts may order return to

Indians of proceeds from state taxes illegally derived from Indian property); see also p. 16, *supra*. Nor was it novel for the court of appeals to conclude that its equitable authority extended beyond the technical contours of common law rights of recovery such as assumpsit or constructive trust. Rather, as this Court stated in *Board of County Commissioners* v. *United States*, 308 U.S. 343, 350 (1939), "federal courts [are not] restricted to the remedies available in state courts in enforcing * * * federal rights."

Finally, the court of appeals appropriately exercised its equitable authority in the present case, and in any event further review is not warranted. The court of appeals required petitioners to surrender the proceeds of their illegal taxes to the Tribe because

> Montana levied the unlawful taxes with the illegitimate intent of appropriating most of the economic rent from the Tribe's coal and the State benefitted from its wrong. The legitimate claim of the State on profits from the Tribe's coal is minimal and the Tribe's interest is strong.

Pet. App. 12. Essentially, the court of appeals concluded that, but for Montana's illegal taxes, the Tribe would have received substantially greater benefits from its coal, whether in the form of royalties or in the form of the severance tax it had unsuccessfully attempted to impose upon Westmoreland. *Id.* at 11-12. That fact-specific conclusion is amply supported by the record. See, *e.g.*, Pet. App. 30, 96-100 (detailing evidence supporting conclusion that Montana's coal taxes deprived Tribe of royalty revenue); C.A. E.R. 12 (when Tribe sought to renegotiate its lease with Westmoreland, Westmoreland took position that "any

additional payment to the Tribe would have to be in lieu of, rather than in addition to, the state tax").[11]

In any event, the decision of the court of appeals to provide the Tribe with an equitable remedy in the unusual circumstances of the present case does not merit this Court's further review. This Court has recognized that Montana's illegal coal taxes were "unique" and "extraordinarily high." *Cotton Petroleum Corp.*, 490 U.S. at 186 & n.17. Petitioners provide no persuasive reason to believe that the ruling in this case is likely to have sweeping implications of the kind they hypothesize.

4. To the extent that petitioners suggest that review is appropriate in light of the sums of money that may be involved, their concern is in significant part

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[11] Petitioners particularly challenge the court of appeals' suggestion (Pet. App. 11-12) that Westmoreland would have paid the Tribe's severance tax but for the existence of Montana's coal taxes. Pet. 7-8. It is true that Westmoreland successfully opposed imposition of the Tribe's tax, and the Department of the Interior for some years incorrectly refused to approve it. Pet. App. 31, 36. Petitioners overlook, however, the fact that Westmoreland's opposition to the Tribe's tax stemmed in significant part from its resistance to concurrent taxation. *Id.* at 31. In the absence of Montana's preexisting taxes, it is far from clear that Westmoreland would have resisted the Tribe's severance tax. In any event, that factual issue does not merit this Court's review.

More importantly, even if Westmoreland would not have paid the Tribe's tax had there been no Montana taxes, the decision of the court of appeals does not turn on that point. The court of appeals also held that the existence of Montana's coal taxes reduced the royalties that the Tribe could charge (Pet. App. 11), and petitioners do not identify any barrier that would have prevented the Tribe from obtaining higher royalties had Montana's taxes not been in place.

premature. Although the court of appeals has conclusively determined the question of petitioners' liability for the illegal taxes they collected, it remains for the district court on remand to determine whether to award prejudgment interest, and if so in what amount. Pet. App. 12. Cf., *e.g.*, *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (citing cases).

More importantly, the relief accorded to the Tribe simply requires petitioners to surrender the proceeds of their illegal taxes. The substantial amount of money involved reflects the "extraordinarily high" taxation rates that petitioners unlawfully imposed upon the Tribe's coal, and petitioners are not well placed to complain that it would be inconvenient for them to return proceeds to which they were never entitled.[12]

5. The Tribe's conditional cross-petition does not warrant review, even if the Court were to grant the principal petition. The court of appeals' ruling that the Tribe was not entitled to recover damages in connection with the failed Shell lease rests on the factual conclusions of that court and the district court that the coal taxes did not cause the failure of that lease. Pet. App. 12-14, 54-56. Those factual

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[12] Montana's claims about the adverse fiscal consequences of the ruling of the court of appeals are also exaggerated, given that Montana's coal trust fund, into which it deposited a significant portion of the proceeds of the illegal severance tax at issue in this case, was valued at over $500 million in 1993. Pet. App. 25.

conclusions do not merit further review. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985).

There is no merit to the Tribe's claim that the holding of the court of appeals conflicts with decisions of this Court that have in certain contexts eased plaintiffs' burden of proving causation and damages. Cross-Pet. 13 (citing *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), and *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)). First, the Tribe exaggerates the force of the rule articulated in *Bigelow*. Although the Tribe suggests that *Bigelow* requires that the burden of proof on questions of causation and damages be shifted to the defendant (Cross-Pet. 17), this Court has made clear that *Bigelow*'s effect is much more limited. See *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) (*Bigelow* establishes that after antitrust plaintiff establishes violation, plaintiff's "burden is to some extent lightened").

The Tribe also overstates the sweep of the *Bigelow* rule. *Bigelow* does not, as the Tribe suggests, reflect a general lightening of the burden of proof borne by plaintiffs on issues of causation and damages. Rather, it applies principally in contexts in which the injury to the plaintiff is of a kind that makes proof of damages particularly difficult. See, *e.g.*, *Chrysler Motors*, 451 U.S. at 566 ("Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land.").

It is not at all clear that such a rule must be applied to the relatively straightforward causation question at issue in this case, *i.e.*, whether the breakdown in

the relationship between Shell and the Tribe was caused by Montana's coal taxes or by other factors. The Tribe has not identified any decision that conflicts with the court of appeals' conclusion that the *Bigelow* rule did not apply to that causation question.[13]

Finally, the decision of the court of appeals does not conflict with *Mills*, 396 U.S. at 375. In *Mills*, the Court held that a stockholder challenging a merger on the ground that it was accomplished through use of a materially false proxy statement need not prove that the proxy statement caused the favorable vote of the stockholders. *Id.* at 381-386. The holding in *Mills*, however, turned in significant part on the conclusion that such an approach was necessary to effectuate a congressional purpose to ensure that shareholder votes were informed. *Id.* at 385. In the present case, there is no analogous congressional purpose relating to fair process. The court of appeals properly found that *Mills* was inapposite.

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[13] The court of appeals was not correct, however, to suggest categorically that the *Bigelow* rule does not apply to issues of causation. As the Tribe points out (Cross-Pet. 18-22), the *Bigelow* rule has been applied in certain contexts to issues of causation. This overstatement by the court of appeals was not essential to the outcome of the case, however, and provides no basis for review by this Court. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("this Court reviews judgments, not opinions").

CONCLUSION

The petition for a writ of certiorari in No. 96-1829 and the conditional cross-petition for a writ of certiorari in No. 96-1984 should be denied.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1996

THE CROW TRIBE OF INDIANS,

Cross-Petitioner,

v.

STATE OF MONTANA; MARY BRYSON; BIG HORN COUNTY; MARTHA FLETCHER; and UNITED STATES OF AMERICA,

Cross-Respondents.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Does the District Court's factual determination, as affirmed by the Court of Appeals, that the Montana coal severance and gross proceeds taxes were not the cause of Shell Oil Company's failure to develop the Youngs Creek Mine present a substantial federal question or create an inter-circuit conflict?

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STATEMENT

The Court of Appeals affirmed the District Court's determination that enactment of the Montana coal severance and gross proceeds from coal taxes did not interfere with the contractual or business relationship between cross-petitioner Crow Tribe and Shell Oil Company. Pet. App. 12-14; COL ¶¶ 36-46, Pet. App. 54-57.[1] The Tribe, but not the United States, seeks review of the Ninth Circuit's judgment on this issue. Although the District Court's determination was grounded in the particular facts material to the claim, the cross-petition largely omits discussion of them. The Tribe's failure in this regard illustrates why the United States and it pursued a quite peculiar quasi-contract claim with respect to Westmoreland Resources, Inc.'s tax payments: The facts did not support recovery under a more straightforward theory seeking damages because of the alleged effect of the taxes on coal development within the Crow Reservation or the ceded strip.

I. In June 1972 the Tribe and Shell entered into a coal mining lease agreement under the Omnibus Indian Mineral Leasing Act, 25 U.S.C. § 396a-396g. Defs.' Ex. 563. The leased lands totaled over 30,000 acres within the Reservation. It was Shell's intention to develop a facility, known as the Youngs Creek Mine, on this acreage. In anticipation of the mine's construction, Shell secured coal contracts from Cajun Electric Power Cooperative and

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[1] All references to "Pet. App." are to the appendix to the Petition in No. 96-1829.

Houston Lighting and Power Company whose requirements would be fulfilled from Youngs Creek production. Defs.' Exs. 564, 565. These contracts were signed November 1974 and January 1975. They eventually were canceled by mutual agreement in February and March 1981. Defs.' Exs. 583, 584.

Even prior to execution of the Cajun Electric and the Houston Lighting contracts, Shell was on notice that the Tribe was dissatisfied with the 1972 lease. In July 1974 the Tribe adopted Resolution 75-06A declaring "that all tribal 'coal mining leases, whether existing or pending, are hereby declared null and void . . . and are of no effect whatsoever.' " Defs.' Ex. 600 at 14. Almost a year later, the Tribe's attorney "informed Shell that the Shell Lease was declared invalid and void by . . . Resolution #75-06A and further advised Shell that any additional investments by it, in connection with such lease, would be at Shell's own risk and that no subsequent act [of the Tribe] would be construed as a waiver of [the Tribe's] right to challenge the validity of the Shell Lease." *Id.*

The tribal resolution and its attorney's letter were not mere bargaining rhetoric. In 1976 the Tribe initiated suit against the United States, Shell, and several other mining companies with which the Tribe had coal contracts under the Indian Mineral Leasing Act. *Crow Tribe v. Kleppe*, No. CV-76-10-BLG (D. Mont.). The Tribe sought to void Shell's 1972 lease on various grounds, including the Department of the Interior's failure to comply with federal regulations limiting coal leases to 2560 acres unless

certain findings were made[2] and the agency's failure to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d, prior to approving the leases. Defs.' Ex. 598. On the basis of the Ninth Circuit's decision in *Cady v. Morton*, 527 F.2d 786 (9th Cir. 1973),[3] the Department conceded that it had erred in not preparing an environmental impact statement prior to the leases' approval (Defs.' Ex. 601 at 1-2) and, over one year into the litigation, agreed that the coal leases were invalid because the acreage limitation in 25 C.F.R. § 171.9(b) had been exceeded without the requisite findings. Defs.' Exs. 606, 611 at 2. In May 1978 the District Court granted partial summary judgment to the Tribe, voiding the Shell lease's approval for failure to comply with § 171.9(b). Defs.' Exs. 609, 610.

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[2] At the time Shell's and the other mining companies' leases were approved by the Department, 25 C.F.R. § 171.9(b) restricted leases to 2560 acres unless the Commissioner of Indian Affairs first found "that the approval of . . . larger acreage is in the interest of the lessor and is necessary to permit the establishment or construction of thermal electric power plants or other industrial facilities on or near the reservation." Defs.' Ex. 597 at 6-7.

[3] In *Cady* the Court of Appeals concluded that the Department of the Interior's approval of Westmoreland Resources' coal leases on the ceded strip constituted a "major federal action" within the scope of 42 U.S.C. § 4332(a)(C). 527 F.2d at 793. In so holding, the court stated that "[n]either the status of Indians nor the manner in which their lands are held in trust justifies removing from the 'major federal action' category the 1972 approval of the leases in this case." *Id.*

It is thus unsurprising that Shell gave notice in 1976 to Cajun Electric and Houston Lighting under their contracts' force majeure provisions that it would be unable to supply coal from the Youngs Creek Mine as previously agreed and that those utilities should satisfy their coal demands elsewhere – at least until the mine's status could be resolved. Defs.' Ex. 576 at 5-8; *see also* Defs.' Exs. 572, 573; Pls.' Ex. 221; I 1984 Tr. 95:10-96:7. It is equally unsurprising that Shell ceased development efforts at Youngs Creek upon the filing of the *Kleppe* litigation. I 1984 Tr. 116:16-21.

Discussions between the Tribe and Shell to resolve their differences nonetheless had begun prior to the filing of the *Kleppe* suit, with Shell offering in February 1976 to enter into "an entirely new coal mining lease." Defs.' Ex. 566. Among the terms in this offer was a provision relating to payment of tribal taxes:

> The sum of all taxes, including, but not by way of limitation, license fees, reclamation fees, and other similar fees, levied against Shell by the Crow, the State of Montana, and Big Horn County shall not exceed the sum which would be levied by the State of Montana and Big Horn County if Shell's coal mining operations were located on non-Indian lands in Big Horn County. Shell will cooperate with the Crow in arriving at a settlement of the differences between the Crow and the State of Montana concerning the authority of the State of Montana to levy taxes on coal produced from the reservation, including a payment of not to exceed $35,000.00 to reimburse the Crow for the expense of employing tax counsel.

Id. at 2. Although another four years passed until a new lease agreement was reached whose terms differed markedly from Shell's initial offer, the tax provision included in that lease was substantially identical to the February 1976 proposal – omitting only the attorney's fee payment provision. I 1984 Tr. 89:16-90:18; Pls.' Ex. 268 at art. 18.02; Defs.' Exs. 569, 570, 574, 575, 577. One inference from the similarity of the two tax provisions is that other differences existed between the Tribe and Shell, and evidence at the 1984 trial explored those differences.

That evidence revealed an intense debate between 1975 and 1980 within the Tribe over the most prudent approach to reservation coal development. Aside from the moratorium on such development contained in Resolution No. 75-06A and the *Kleppe* litigation, this debate led to political turmoil and various changes in the tribal officials responsible for dealing with Shell. I 1984 Tr. 120-22; VII 1984 Tr. 1091-96; Defs.' Ex. 531 at 11-15, 36-39. The debate also influenced the Tribe's negotiating demands, which included seeking greater control over the mining operations and a smaller lease area. I 1984 Tr. 86-87. A final difficulty arose with the United States itself: Although signed by the Tribe and Shell in May 1980, the new lease was not approved by the Department of the Interior until January 1983. Defs.' Ex. 585. No evidence suggested the delay in the Department's approval was attributable to the state taxes, and the delay was identified by a Shell representative as an important factor in cancellation of the Cajun Electric contract. I 1984 Tr. 108:22-109:6.

II. The Tribe and the United States first raised a claim for retroactive relief directed to the failure of Shell

to develop the Youngs Creek Mine when, shortly before conclusion of discovery in connection with the 1994 trial, they sought leave to file amended complaints alleging tortious interference with business or contractual relationships. CR 585, 588.[4] The District Court denied their motions in July 1993, stating in part that the plaintiffs had been allowed to amend their complaints in the past and that "[t]o allow [the amendments] could change the course of the litigation." CR 637 at 4. The court also denied a motion to reconsider this ruling two months before the trial itself. CR 669. The court nevertheless permitted over objection the Tribe and the United States to offer evidence concerning the alleged damages flowing from nondevelopment of the Youngs Creek project (I 1994 Tr. 100) and addressed the merits of their claim in its decision. The District Court's findings discussed the *Kleppe* litigation and observed further that among issues dividing the Tribe and Shell had been the former's "concerns about Shell's management rights and [the Tribe's] own sovereignty relating to control of coal mining operations on the reservation," "concerns over the size of the lease," and "concerns about Shell providing its members

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[4] Each proposed amended complaint sought monetary recovery for Montana's and Big Horn County's alleged unlawful interference with the Tribe's business and contractual relationships through application of the severance and gross proceeds taxes to coal underlying the Crow Reservation and the ceded strip. The proposed complaints additionally sought recovery of taxes paid with respect to coal produced in Montana and sold to Houston Electric. In its motion for leave to file the amended complaint, the Tribe stated that it intended to rely on facts established during the 1984 trial for purposes of establishing liability. CR 586 at 6-7.

employment opportunities." FOF ¶ 70, Pet. App. 39. It continued on to note that Shell officials had testified at the 1984 trial and

> identified other impediments to successful negotiations with the Tribe. There was concern with the Crow Land Use Ordinance in that Shell feared the Tribe would impose constraints Shell could not abide. For periods, there w[ere] internal conflicts among tribal factions, which clouded who was the true negotiating agency for the Tribe. Various resolutions were passed by the tribal council restraining the authority of tribal officers and entities from representing and negotiating on behalf of the Tribe.

FOF ¶ 75, Pet. App. 40. While the Tribe was concerned also with the financial terms of the lease and the state taxes "left less room for the Tribe and Shell to negotiate more favorable financial terms" (FOF ¶ 76, Pet. App. 41), the District Court found that

> [t]he record does not support the assertion that the Montana coal taxes were responsible for the loss of revenue due to the protracted negotiations between Shell and the Tribe. The issues of acreage coverage, options on additional tracts, tribal control over mining operations, and tribal ordinance restrictions were definite and sharp points of disagreement which clearly delayed successful lease negotiations.

FOF ¶ 79, Pet. App. 41. The latter issues "were the causative factors for the Youngs Creek facility not being developed to supply the Cajun and HL&P contracts." FOF ¶ 81, Pet. App. 42. Thus, the Tribe's statements in the cross-petition that no "evidence presented by any witness

that the Tribe and Shell would not have been able to agree on an amended lease if Montana had not sought to apply its taxes to the Tribe's coal" and that "[a]ll of the issues involved in the Tribe/Shell negotiations had been resolved in the November 1974 amended lease with Westmoreland" simply do not parse with the record. Cross-Pet. at 7. Not only was there ample evidence to the contrary, but the District Court so found.

In its conclusions of law, the District Court applied these factual findings to traditional intentional interference with contractual or business relationship standards and held that "[t]he state taxes certainly did not cause Shell to breach its coal lease agreement" since it was the Tribe which sought to invalidate the agreement (COL ¶ 40, Pet. App. 55) and that other factors impeding the renegotiation process militated against assigning "a cause and effect relationship between Montana's coal taxes and the Tribe's alleged damages" (COL ¶ 44, Pet. App. 56). In short, the court did "not find that the damages and losses claimed by the Tribe due to the loss of Shell's business resulted from the actions of the defendants." *Id.*

The Court of Appeals affirmed, crediting the District Court's determination that

> although taxes may have impaired the Tribe's ability to lease its coal, they were only one factor in the failure of the lease negotiations, and other factors were clearly more influential: the Tribe itself repudiated Shell's 1972 lease before the state taxes were imposed, and in 1976 the Tribe successfully sued to invalidate the lease on the ground that the Department of Interior had approved it without making certain findings

> required by law. Other evidence showed that Shell officials were concerned about internal conflicts among the Tribe's leaders and disputes as to who had authority to represent the Tribe in negotiations with Shell.

Pet. App. 13-14. In a footnote focused on by the cross-petition, the Ninth Circuit rejected the contention that "Montana should bear the burden of proving that the unlawful taxes did *not* cause the harm." *Id.* at 13 n.4. It distinguished *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946), on the ground that *Bigelow* dealt with the issue of uncertainty in the amount of damages and stated no reason had been offered for extending "to this area the Supreme Court's analysis of proof of causation in securities cases" as exemplified by *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). *Id.*

ARGUMENT

The cross-petition does not present a substantial federal question or an inter-circuit conflict warranting review. *See* S. Ct. R. 10(a) & (c). The facts, as the District Court found, showed that the state taxes did not cause nondevelopment of the Youngs Creek Mine. That nondevelopment resulted instead from the Tribe's 1974 resolution purporting to void Shell's and other coal producers' leases, the subsequent litigation in *Kleppe* to implement that resolution, the consequential inability of Shell to supply its contracts with Cajun Electric and Houston Lighting from the mine as had been anticipated, and the Tribe's own internal division over the conditions under which coal mining was to be conducted on the

Reservation. Thus, aside from the inapposite nature of the authority it relies upon, the cross-petition simply fails to come to grips with the District Court's findings, which were supported amply by the record, that the Tribe's actions, not the taxes, caused the Youngs Creek Mine not to be developed and with the fundamental principle that those findings are entitled to deference under Fed. R. Civ. P. 52. The cross-petition does nothing more than attempt to clothe a garden-variety attack on a set of factual determinations in the dress of misapplication of allegedly applicable legal standards. The contention that certiorari should be granted to review the disposition of the Shell claim is made even more problematic by the unavailability of relief against the state cross-respondents by virtue of the Eleventh Amendment.

I. The Lower Courts' Disposition of the Shell Claim Neither Presents a Substantial Federal Question Nor Conflicts With This Court's or Other Courts of Appeals' Decisions.

A. The Ninth Circuit's affirmance of the District Court's determination that the Montana taxes did not cause the breakdown of the Tribe's relationship with Shell and the attendant nondevelopment of the Youngs Creek Mine is patently unworthy of review by this Court. The Court of Appeals properly and reasonably agreed with the District Court's findings. In so doing, it did not establish any new principle of law, much less one that must be addressed by this Court.

The District Court found, and the Ninth Circuit agreed, that numerous factors other than Montana's coal

taxes caused the Youngs Creek facility not to be developed as Shell had planned initially. Most importantly, the trial court concluded that the 1972 Shell contract was terminated as a result of litigation initiated by the Tribe on grounds unrelated to the state taxes and that the delay in consummating a successor contract and securing secretarial approval was attributable to reasons other than the taxes' existence.

Additional causative factors found by the District Court included the Tribe's unilateral termination of the 1972 lease; the ensuing *Kleppe* litigation; Shell's concerns over tribal regulation that would interfere materially with its ability to extract coal efficiently; the amount of acreage subject to the lease; and options on additional tracts for mining purposes. Underlying these points of disagreement was the Tribe's own internal division over the nature and scope of reservation-based coal mining.

The Ninth Circuit's affirmance of these findings was entirely consistent with the highly deferential standard of review under Rule 52(a). Indeed, it is impossible to conclude from the record below that the District Court's "account of the evidence is [im]plausible in light of the record viewed in its entirety." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985); *see, e.g., Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 623 (1993) ("review under the 'clearly erroneous' standard is significantly deferential, requiring a 'definite and firm conviction that a mistake has been

committed' "). The Tribe's challenge to the factual determinations of the lower courts plainly falls outside the range of issues warranting this Court's attention.[5]

B. Faced with this overwhelming evidence and the dictates of Rule 52(a), the Tribe claims that the lower courts should have shifted the burden of proof on the issue of causation to the cross-respondents and that, in failing to do so, they created a conflict with two decisions of this Court and their progeny. This transparent effort to convert a factual question into a legal one is unavailing. As an initial matter, the evidence in this case was so lopsided that no reasonable person could conclude that the state taxes caused the breakdown of the Tribe's relationship with Shell regardless of who bore the burden of persuasion. That said, the decisions on which the Tribe

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[5] It bears noting that the Tribe's reference to the Court of Appeals' statement in *Crow Tribe v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd mem.*, 484 U.S. 997 (1988), that "[b]ecause of the taxes, the lessee cannot find a buyer, making it difficult for Crow to find a lessee" (819 F.2d at 903, Pet. App. 108) is not inconsistent with the District Court's or the Ninth Circuit's analysis in the decisions giving rise to this proceeding. Cross-Petition at 9. The Tribe had found a lessee, Shell, first in 1972 and again in 1980, and the statement thus appeared concerned with the situation following Shell's termination of the 1980 contract in December 1985. CR 302. The Tribe, however, offered no evidence at the second trial estimating damages with respect to the cancellation of the 1980 lease. *See* Pls.' Ex. 319 at 37-53. Moreover, since Shell had committed itself to paying a tax to the Tribe comparable to the state taxes, it is difficult to fathom how the Tribe was harmed by the prospect of the Montana taxes' being imposed; i.e., to the extent the state taxes were claimed to have a negative impact on Shell's ability to find buyers for reservation coal, the tribal tax would have had the same effect.

principally relies – *Bigelow v. RKO Pictures*, 327 U.S. 251 (1947), an antitrust case, and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), a securities case – simply have no applicability to the situation involved here. Whatever merit the Tribe's argument might have in another factual context, its attempt to stretch *Bigelow*, *Mills* and sundry authority from other courts of appeals to encompass this case, and thereby to establish either a substantial federal question or a conflict among the circuits justifying review, is thus wholly untenable.[6]

Bigelow is a case about antitrust damages. It arose from a claim under the Sherman and Clayton Acts alleging a conspiracy to deprive an independent theater's owners of the opportunity to show first-run films as soon as they became available to theaters affiliated with various film distributors. A jury verdict was returned in the plaintiffs' favor, but on appeal the judgment was reversed because, in the court of appeals' view, the evidence of

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[6] The Tribe contends that the Court of Appeals' analysis concerning the Shell claim conflicts with various decisions from other circuits, most dealing with federal antitrust claims and all applying *Bigelow*. Cross-Pet. at 20-21; *see Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc.*, 891 F.2d 1127 (4th Cir. 1989) (upholding jury verdict that found liability under federal antitrust laws), *rev'd on other grounds*, 499 U.S. 365 (1991); *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellshaft*, 828 F.2d 1033 (4th Cir. 1987) (same); *Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798 (1st Cir. 1964) (same); *Switzer Bros., Inc. v. Locklin*, 297 U.S. 39 (7th Cir. 1962) (affirming judgment of district court directing accounting under federal antitrust laws); *Thompson v. Missouri Bd. of Parole*, 929 F.2d 396 (8th Cir. 1991) (federal habeas corpus proceeding); *United States ex rel. Schuster v. Vincent*, 524 F.2d 153 (2d Cir. 1975) (same). These cases add nothing. *Bigelow* is inapposite, and so are its progeny.

damages had been insufficient to allow the case's submission to the jury. 327 U.S. at 254. In turn reversing the circuit court, this Court first observed the evidence made it "indisputable that the jury could have found . . . that, other things being equal, the establishment of the discriminatory release system was damaging to the [plaintiffs] who were relegated by it to a playing position inferior to that of their competitors." *Id.* at 260. It then rejected the argument that the plaintiffs' evidence provided an insufficiently certain basis upon which to calculate damages. In thus ruling, the Court reaffirmed the general rule that damages may not be "based on speculation and guesswork" (*id.* at 264) but, pointing to prior decisions which had sustained damage awards where "[t]he tortious acts had . . . precluded ascertainment of the amount of damages more precisely," held that antitrust damages could be proved "by comparison of profits, prices and values as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions." *Id.* at 264. The Court concluded that this comparison was a sufficient basis for the jury's computation of damages, where "the respondents' wrongful action had prevented petitioners from making any more precise proof of the amount of damage." *Id.* at 266.[7]

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[7] Justice Frankfurter dissented from the Court's decision on the basis that the issue was not the amount of damages but whether the conspiracy among the film distributors and their affiliates had caused any injury. *Id.* at 267 (Frankfurter, J., dissenting). He distinguished between uncertainty as to the existence of an injury from wrongful antitrust conduct and uncertainty as to the monetary value of such injury once shown. *Id.* at 268. The majority opinion, however, treated the issue not as causation but as the appropriateness of using before and after

Mills, unlike *Bigelow*, dealt directly with the issue of the burden of proof attendant to showing that a statutory violation had occurred. The question, as framed by this Court, was "what causal relationship must be shown between [a materially false or misleading proxy] statement and the merger to establish a cause of action" for violation of section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a). The challenged merger had been approved in part by the use of proxies from a substantial group of minority shareholders whose votes the district court had deemed " 'necessary and indispensable to the approval of the merger.' " 396 U.S. at 379. On interlocutory appeal under 28 U.S.C. § 1292(b), however, the court of appeals, ignoring the fact that the minority shareholders' votes had been essential to the merger's approval, held the proper standard for determining liability was whether "the merger had merit and was fair to the minority shareholders." *Id.* at 380. This Court reversed and held as follows:

> Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if . . . he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. This objective test will avoid the impracticalities of determining how many votes were affected, and, by resolving doubts in favor of those the statute is

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income as the measure of damages. *See* II Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 365b2, at 240-41 (rev. ed. 1995).

> designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions.

396 U.S. at 387; *see also Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972) ("[a]ll that is necessary is that the facts withheld be material [under Rule 10b-5, 17 C.F.R. § 240.10b-5 (1996)] in the sense that a reasonable investor might have considered them important in the making of the decision"). The Court accordingly determined that the district court had not erred in granting summary judgment as to liability. *Id.* at 389.

The holding in *Mills* was specific to the securities context and turned on (1) the definition of the term "material" and (2) the need to fashion a rule that would permit the determination of causation when thousands of transactions are involved. That holding has no application in this case which involved a straightforward issue of causation, in which there was a determination by the finder of fact that the state taxes did not cause the breakdown in the relationship between the Tribe and Shell, and where there was no problem in determining causation in the time-honored way – by evaluating the facts under ordinary burden of proof standards. The Ninth Circuit did not create any conflict in declining to extrapolate from the holding in *Mills*, or in *Bigelow*, a generalized rule that would dispense with ordinary burden-of-proof requirements.[8]

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[8] *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102-06 (1991) (refusing to extend *Mills* causation standard to minority shareholders whose votes were not required for

II. The Absence of a Substantial Federal Question Is Reflected Further in the State Cross-Respondents' Immunity from Suit Under the Eleventh Amendment.

Ignored in the cross-petition is the state cross-respondents' immunity under the Eleventh Amendment from retroactive relief on the basis of the Tribe's claim, regardless of whether the relief is characterized as legal or equitable in nature. *Blatchford v. Village of Noatak*, 501 U.S. 775 (1991); *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). While those cross-respondents' immunity could not be asserted against the United States, the Government has not sought review of the Ninth Circuit's rejection of the Shell claim and thus is bound by the lower courts' judgment on this issue. *See, e.g., Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 (1994); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976).[9]

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approval of the challenged transaction); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 51 (1977) (Blackmun, J., concurring) (distinguishing suit by tender offeror to recover damages from *Mills*-like nondisclosure violation because in the former situation "causation is a far more complex issue"); *see generally* 2 Alan R. Bromberg & Lewis D. Lowenfels, *Securities Fraud & Commodities Fraud* § 5.7(250) & (260), at 5:69-5:82 (1990) (discussing the relationship of reliance and causation under section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5).

[9] Any reliance by the Tribe on *Arizona v. California*, 460 U.S. 605 (1983), for the proposition that it may pursue independently a claim for retroactive relief against the state cross-respondents is misplaced. This Court held there only that the Eleventh Amendment did not preclude intervention by five tribes in an

The lack of available relief against the state cross-respondents renders the Tribe's claim even more problematic than it otherwise plainly is. The county cross-respondents were obligated under state law to impose and collect the gross proceeds tax to the extent taxable production occurred. 1975 Mont. Laws ch. 525, § 11, Pet. App. 242. Since Big Horn County had no opportunity to impose or collect the gross proceeds tax with respect to on-reservation mining activity by Shell, the gravamen of the Tribe's claim must be that the mere existence of the two taxes interfered with its business or contractual relationship with Shell. Yet it is clearly farfetched to suggest the County intentionally interfered with the business or contractual relationship between the Tribe and Shell, or somehow "violated" federal law, merely because the Montana legislature enacted a statute whose potential application eventually was held preempted to on-reservation coal production.[10]

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ongoing original proceeding where the United States already was a party and was raising claims on the tribes' behalf. *Id.* at 612, 614. The Court recognized, however, that the United States' actions were binding on the tribes regardless of their intervention. *Id.* at 615. The situation differs markedly here because the United States has not challenged the Court of Appeals' decision concerning the tortious interference claim and therefore is bound by it.

[10] The Tribe did seek to recover under a quasi-contract theory taxes assessed with respect to off-reservation production of nontribal coal sold to Houston Lighting on the theory that, but for the existence of the state taxes, that production would have occurred on the Crow Reservation. CR 585, Fifth Am. Compl. (lodged) ¶¶ 30, 31. However, there is no dispute that those taxes were assessed and collected lawfully and that nothing Big Horn County did affected Houston Lighting's decision to source its coal from the off-reservation mine.

Nevertheless, even if under some theory Big Horn County could be held liable for retroactive relief merely because under state law it would have collected and received a portion of the gross proceeds tax had the tax been imposed on Shell, the courts below concluded that the *combined* effect of the severance and gross proceeds taxes was not responsible for Shell's failure to develop the Youngs Creek Mine. The gross proceeds tax rate during the period material here was approximately five percent of the "contract sales price" as determined under the severance tax statute, while the severance tax rate was 30 percent of the contract sales rate. FOF ¶¶ 31, 34, Pet. App. 25, 26. The evidence thus hardly supports the theory that the gross proceeds tax, standing alone, was sufficient to interfere impermissibly with the Shell relationship. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 169 (1989) (sustaining 8 percent oil and gas tax against preemption claim). Given such a record, the contention that a substantial federal question or an inter-circuit conflict exists is insupportable.

CONCLUSION

For the foregoing reasons, the cross-petition for certiorari should be denied.

Respectfully submitted,

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October Term, 1996

THE CROW TRIBE OF INDIANS,

Cross-Petitioner,

v.

STATE OF MONTANA; MARY BRYSON; BIG HORN COUNTY; MARTHA FLETCHER; and UNITED STATES OF AMERICA,

Cross-Respondents.

On Conditional Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEFS IN OPPOSITION

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ARGUMENT

The Briefs for the United States and for the Non-federal Cross-Respondents (Montana) in opposition to the Crow Tribe's Conditional Cross-Petition demonstrate why the issue raised in the Cross-Petition should be reviewed if, contrary to the Crow Tribe's principal position, this Court grants the Petition filed by Montana and Big Horn County (# 96-1829).

1. Contrary to the primary argument advanced by both the United States (Opp'n Br. at 22-23) and Montana (Opp'n Br. at 10-12), the District Court's factual findings do not justify denying the Conditional Cross-Petition. First, the District Court recognized that Montana's illegal taxes "impair[ed] the tribe's ability to negotiate leases with Shell Oil and other coal companies" and found that "[t]he existence of the Montana taxes left less room for the Tribe and Shell to negotiate more favorable financial terms to the Tribe." Pet. App. 38, 41; Cross-Pet. at 7, 9. Those unchallenged findings establish that Montana's illegal taxes harmed or injured the Tribe in its business dealings with Shell. Standing alone, they are a sufficient predicate for the Tribe's contention that the courts below erred as a matter of law in denying *any* relief to remedy that wrong. *See* Cross-Pet. at 15, 19-20 & n.9.

Second, the question presented in the Cross-Petition is whether the very findings on which the cross-respondents rely were contaminated by the burden of proof being placed improperly on the Tribe rather than on the wrongdoers, Montana and Big Horn County. "It is elementary" that "where findings are infirm because of an erroneous view of the law, a remand is the proper course

unless the record permits only one resolution of the factual issues." *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982).

"[T]he assignment of the burden of proof is a rule of substantive law." *OWCP Director v. Greenwich Collieries*, 512 U.S. ___, ___ 129 L.Ed.2d 221, 227 (1994). Determining whether the lower courts applied an erroneous burden of proof is a worthy subject for review by this Court. In *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 663 (1979), for example, certiorari was granted to consider whether the lower courts properly construed a federal statute, 25 U.S.C. §194, which imposed the burden of proof upon the "white person" in all trials with an Indian about the right of property. This Court's interpretation of the statute differed in part from the lower courts', so the case was remanded for new findings based on the correct legal standard. The burden of proof issue presented in the Tribe's Cross-Petition is at least as worthy of this Court's attention because it is likely to arise across a broader spectrum of cases, whenever federal courts are requested to fashion appropriate remedies to redress violations of federal law.

2. The United States acknowledges that the Court of Appeals erred by limiting the rule of *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946), that "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," to proof of the amount of damages as opposed to establishing the fact of injury or causation. Opp'n Br. at 23, 24 & n.13. The government also concedes that this Court, as well as five courts of appeals, have applied the *Bigelow* rule to issues of causation. *Ibid.* The questions raised by the United States regarding the force

and scope of the *Bigelow* rule (Opp'n Br. at 23-24) are the very sort of issues that should be addressed if this Court grants the petition to review the rules governing the fashioning of appropriate equitable remedies to redress violations of federal law.*

As this Court stated in *Chrysler Motors*, "it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted." 451 U.S. at 567. The government offers neither reason nor authority nor any equitable consideration supporting the imposition of the burden of proof regarding factual uncertainties attributable to the wrongdoers' illegal conduct on those whose federally protected rights were violated.

3. Montana similarly seeks to distinguish *Bigelow* and the analysis of the causation issue in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381-86 (1970), on the grounds

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* Even if, as the government suggests, the *Bigelow* rule only "lightens" plaintiff's burden of proof, as opposed to shifting it to the defendants, the issue of causation should be remanded to the district court for a factual determination based on that relaxed standard.

With regard to the proper scope of the *Bigelow* rule, this Court has explained that the *Bigelow* rule applies in the business context where "the vagaries of the marketplace usually deny us sure knowledge of what the plaintiff's situation would have been in the absence of defendant's violation." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981). The question of whether the Tribe and Shell would have been able to restructure their relationship if Shell had been able to offer the Tribe an additional $480 million over the 20 year lease period (*see* Cross-Pet. at 6-7) is as subject to the vagaries of the marketplace as any other business transaction.

that those decisions should be limited to the antitrust and securities areas. Opp'n Br. at 12-16. In so doing, Montana ignores this Court's decision in *Chrysler Motors* which explains that the *Bigelow* rule is predicated "in part on the difficulty of ascertaining business damages" and also "on the inequity of a wrongdoer defeating the recovery of damages against him by insisting upon a rigorous standard of proof." 451 U.S. at 566, 568. These factors are equally applicable to the circumstances of the instant case involving Montana's impairment of the business relationship between the Tribe and Shell through the enactment and imposition of its illegal coal taxes. Montana also ignores lower court decisions such as *Thompson v. Missouri Bd. of Parole*, 929 F.2d 396, 401 (8th Cir. 1991), which cite and follow *Bigelow* for the broad rule that "equity . . . resolves uncertainties against those whose wrongful acts or omissions created them." These decisions are consistent with the underlying principle that "[t]he constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done." *Bigelow*, 327 U.S. at 265. While Montana, unlike the United States, does not concede that the Ninth Circuit erred by restricting the *Bigelow* rule only to proof of the amount of damages, it does not cite any decisions or other authorities either supporting the distinction made by the Ninth Circuit or justifying the imposition of rules and standards which make it more difficult to award relief to redress the invasion of federal rights.

4. Montana also argues that assertion of the Tribe's Shell contractual impairment claim against the State is now precluded by the Eleventh Amendment owing to the government's decision not to seek review of the lower

courts' judgment. Opp'n Br. at 17. This precise issue has not been decided by this Court. In *Arizona v. California*, 460 U.S. 605 (1983), however, this Court held that when the United States brings a claim against a state on behalf of an Indian tribe "the States involved no longer may assert that [Eleventh Amendment] immunity *with respect to the subject matter of this action.*" 460 U.S. at 614, emphasis added. Because the States' Eleventh Amendment immunity could not be asserted with respect to the subject matter of that action, the Indian tribes were allowed to press claims to water rights beyond those made by the United States on its behalf. Thus, *Arizona v. California* strongly suggests that the Eleventh Amendment does not apply to the Crow Tribe's Shell contractual impairment claim which was included in the subject matter of the action brought by the United States against Montana.

In any event, the Eleventh Amendment issue may be considered if the Petition and Conditional Cross-Petition are granted. The mere existence of the issue does not warrant denying the Cross-Petition.

CONCLUSION

The Conditional Cross-Petition should be granted if the Petition is granted.

Respectfully submitted,

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